Office Supreme Court
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CHARLES ELMORE

Supreme Court of the United States.

October Term. 1928.

No. 545.

STANDARD OIL COMPANY and SINCLAIR REFINING COMPANY. *Petitioners.*

vs.

CITY OF MARYSVILLE; L. N. COLE, as Mayor; R. E. LONG, et al., etc., *Respondents.*

PETITION FOR CERTIORARI FILED NOVEMBER 16, 1928.

CERTIORARI GRANTED JANUARY 2, 1929.
(33,854)

BRIEF AND ARGUMENT ON BEHALF OF THE RESPONDENTS.

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OUTLINE OF ARGUMENT.

SPECIFICATION OF ERROR No. 1—That the Circuit Court of Appeals Erred in Reversing the Judgment of the District Court.

I. The Ordinance: Its object and purpose.

The Ordinance seeks only to regulate by directing the manner in which petroleum products shall be stored within the city.

State v. Cozad, 113 Kan. 200;
Murphy v. United States, 225 U. S. 623; 56 L. ed. 1229;

II. Judicial review of the Exercise of the Police Power.

A. The presumption is that the Ordinance is valid and the burden of proving it otherwise is on the person asserting it.

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 79; 55 L. ed. 369, 377;
Dillon on Municipal Corporations, 5th Edition, Vol. II., Sec. 591, P. 928-929;
The Pierce Oil Corporation v. Hope (Ark.), 127 Ark. 38; 191 S. W. 405;
Dessner v. City of Wichita, 96 Kan. 820;
City of Chicago v. Washingtonian Home of Chicago, 289 Ill. 286;
Stubbs v. Adamson, 139 N. Y. S. 751.

B. Review of Discretion—Wisdom—Expediency—Harshness and Injustice—Fair Difference of Opinion, etc.

Lawton v. Steele, 152 U. S. 140; 38 L. ed. 385;
Union Oil Co. v. Portland, 198 Fed. 441;
Mo. Pac. R. Co. v. Humes, 115 U. S. 520; 29 L. ed. 463;
Rast v. Van Deman, 240 U. S. 342;
Keokee Coke Co. v. Taylor, 234 U. S. 224; 58 L. ed. 1288;
Pierce Oil Corporation v. City of Hope, — S. 698; 63 L. ed. 381, 3;

Purity Extract and Tonic Co. v. Lynch, 226 U. S. 192, 204; 57 L. ed. 184, 8;
City of Emporia v. Railway Company, 88 Kan. 611;
Deffer v. City of Wichita, 96 Kan. 820;
Stubbe v. Adamson, 159 N. Y. S. 751;
Dillon on Municipal Corporations, Sec. 600, Page 943;
Curtis v. City of Los Angeles, 156 Pac. 462;
Pierce Oil Corporation v. Hope, 127 Ark. 38, 191 S. W. 405, Ann. Cas. 1918E, 143;
Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18; 49 L. ed. 169;
Hartman v. City of Chicago, 282 Ill. 511, 118 N. E. 731;
Zahn v. City of Los Angeles, U. S. 47 Sup. Ct. Rep. 594.

C. Police Power is continuing, cannot be bargained away, and inconvenience or loss due to its exercise does not invalidate it. Therefore, Petitioners have no vested rights.

Mugler v. Kansas, 123 U. S. 623;
Slaughter House Cases, 111 U. S. 746;
Hadacheck v. Sebastin, 239 U. S. 394;
Oleomargarine Cases, 8 Sup. Ct. 922;
Union Oil Company v. City of Courtland, 198 Fed. 441;
Davenport v. City of Richmond, 81 Va. 636; 59 Am. Reports 694;
City of Chicago v. Washingtonian Home of Chicago, 289 Ill. 286; 124 N. E. 416;
Commonwealth v. Nolan (Ky.), 224 S. W. 506.

D. The Ordinance applies alike to all under similar circumstances and is not discriminatory.

Lindsley v. Natural Carbonic Gas Company, 220 U. S. 79;
Southern R. Co. v. Green, 216 U. S. 400; 54 L. ed. 536;
Williams v. Arkansas, 217 U. S. 79;
Mo. Pac. R. Co. v. Mackey, 127 U. S. 209;
Heizler v. Thomas Colliery Co., 260 U. S. 245.

E. Petitioners have no standing to question ordinance on imaginary situations which are not being applied to their disadvantage, or on behalf of other classes of persons making no complaint.

Clark v. Kansas City, 176 U. S. 118;
The Winebago, 205 U. S. 354;
Milling Co. v. Bondurant, 257 U. S. 289;
Yazoo & Mississippi Valley Railroad Co. v. Jackson Vinegar Co., 226 U. S. 217.

III. The Ordinance Constitutes a Reasonable Exercise of the Police Power.

A. The Findings on their face sustain the Ordinance.

1. Nature of the business and its commodity.

Dangerous and inflammable and defies precaution.

11 R. C. L. 660; 12 A. L. R. 1305;
Whittemore v. Baxter Laundry Co., 148 N. W. 437 (Mich.);
O'Harra v. Nelson, (N. J.) 63 Atl. 881;
State v. Cozad, 113 Kan. 200;
Waters Pierce Oil Company v. Mayor, etc., of New Iberia, 47 La. Ann. p. —, 17 So. 343;
Texas Company v. Robt., (Okla.) 212 Pac. 318;
Standard Oil Co. of New York v. Patcher, 289 Fed. 678;
Newton v. Texas Company, (N. C.) 105 S. E. 433;
Stone v. Texas Company, (N. C.) 105 S. E. 425;
Childs v. Standard Oil Co., (Minn.) 182 N. W. 1000;
St Marys Bill Co. v. Illinois Oil Co., (Mo.) 254 S. W. 735;

2. Location of Buildings and Surrounding Circumstances:

3. The record shows that dangers from leakage are negligible.
   a. Electrolysis
   b. Corrosion
   c. Vibration
   d. Temperature
   e. Floating out

B. Assignments of error and erroneous findings of fact made by the Master which were before the Circuit Court of Appeals and which strengthened the validity of the Ordinance.

Assignments Nos. 7 and 10—Consent;
Assignment No. 8—Size of tanks;
Assignment No. 11—Similar tanks;
Assignments Nos. 9, 12, 13, and 13-A—Safety account of venting devices;
State v. Cozad, 113 Kan. 200, 202;
Heeg v. Licht, 80 N. Y. 579;
O'Hara v. Nelson (N. J.) 63 Atl. 811;
Waters Pierce Oil Company v. Mayor, etc., of New Iberia, 47 La. Ann., 43 S. 343;
Pierce Oil Company v. City of Hope, 127 Ark. 38; 191 S. W. 405; 248 U. S. 497, Ann Cas. 1918E 143;
Whittemore v. Baxter Laundry Company, 148 N. W. 437 (Mich.);
Buchholz v. Standard Oil Co., 211 Mo. App. 297; 244 S. W. 972, 978;
Cities Service Oil Company v. City of Marysville, 117 Kan. 514, 519.
Assignment No. 24—Sinclair tanks and devices;
Assignment No. 14—Relative hazard, above and below ground;
Laurel Hill Cemetery v. San Francisco, 216 U. S. 358; 54 L. ed. 515, 516;
Hartman v. City of Chicago, 282 Ill. 511; 118 N. E. 731;
Assignment No. 37—Regulations of the National Board of Fire Underwriters;
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Assignment No. 16—Oil Storage v. Frame Building;
Assignment No. 17—Distance from Standard tanks;
Assignments Nos. 18 and 19—U. Pac. Ballast;
Assignment No. 20—Crude Oil Hazard;
Assignment No. 22—Autos and garage;
Assignment No. 23—Reasonableness of classification;
Assignment No. 25—Fear preventing building;
Assignment No. 26—Corrosion;
Assignment No. 27—Vibration;
Assignment No. 28—Temperature changes;
Assignment No. 29—Seepage through soil;

Assignment No. 31—Hangar from communicated fire;
Assignment No. 32—Explosive mixture—above and below ground;
Assignment No. 33—Relative danger from explosion;
Assignment No. 38—Other exceptions—error in sustaining.

C. The Authorities sustain the Validity of the Ordinance:

Laurel Hill Cemetery v. San Francisco, 216 U. S. 358;
Yick Wo. v. Hopkins, 118 U. S. 346;
Dobbins v. Los Angeles, 195 U. S. 223;
Buckholz v. Standard Oil Company, 221 Mo. App. 297; 244 S. W. 972, 978;
Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643;
Pierce v. Hope, 127 Ark. 38, 191 S. W. 405; 248 U. S. 497, Ann. Cas. 1918E, 143;
Gulf Ref. v. Geman;
Rex v. McGregor, 4 Ontario L. R. 198;
Des Moines v. Oil Co., 184 N. W. 823;
Waters Pierce Oil Company v. New Iberia, 17 So. 343;
Klever Shampay Karpet Kleaners v. City of Chicago, et al., 323 Ill. 368, 49 A. L. R. 103.
Morgan v. Board of Commissioners of Collingswood (N. J.) 139 Atl. 718.
City of Shreveport v. Nelson, (La.) 115 So. 469.

IV. The Case of Cities Service Oil Co. v. The City of Marysville, 117 Kan. 514.

V. The Dissenting Opinion of Judge Phillips.

SPECIFICATION OF ERROR No. 2—That the Circuit Court erred in overruling the findings of the Special Master.

SPECIFICATION OF ERROR No. 3—That the Circuit Court erred in denying the Petition for Rehearing.

1. This evidence was competent and relevant under the issues framed by the pleadings.

The good faith of the City Council.

The Unnecessary Length of the Record.

IN THE

Supreme Court of the United States.

October Term. 1928.

No. 545.

STANDARD OIL COMPANY and SINCLAIR REFINING COMPANY. *Petitioners.*

vs.

CITY OF MARYSVILLE; L. N. COLE, as Mayor; R. E. LONG; G. S. BOWMAN; ED. HALL; J. H. REYNOLDS; OSCAR PERRY; W. E. MILLER; E. G. FILBERT and E. C. WEBBER as Councilmen, and EDGAR C. BENNETT as City Attorney, and P. HAYES, as Marshal of said City of Marysville. *Respondents.*

PETITION FOR CERTIORARI FILED NOVEMBER 16. 1928.

CERTIORARI GRANTED JANUARY 2. 1929.

BRIEF AND ARGUMENT ON BEHALF OF THE RESPONDENTS.

STATEMENT.

This cause is here on Writ of Certiorari to the Circuit Court of Appeals, Eighth Circuit, granted on January 2nd, 1929. (R. 449.)

The Petitioners seek to reverse the judgment of the

Circuit Court of Appeals reversing the decree of the United States District Court for the District of Kansas, and remanding the cause with directions "to dismiss the Bills of Complaint, upon condition that a reasonable time be accorded to appellees to conform to the provisions of the ordinance, and that appellants be perpetually enjoined from enforcing its penalty provisions until the expiration of such time." (R. 435.)

The decree of the District Court permanently and perpetually restrained and enjoined these respondents (a) "from enforcing or attempting to enforce ordinance No. 330 of the City of Marysville, Kansas, insofar as the same requires or attempts to require that tanks for the storage of gasoline, kerosene and naptha, distillate, fuel oil, crude oil and other inflammable and combustible liquids be buried at least three feet under ground;" and (b) "from arresting or prosecuting or attempting to arrest and prosecute * * * any agent or employee" of petitioners "for constructing, maintaining and operating any tank or tanks above ground in the City of Marysville, for the storage of or in which there is stored any of the products above named." (R. 91.)

Any additional statement of the case which respondents deem necessary will be made in the argument to follow. However, in the interest of accuracy, the Court's attention is invited to the fact that the Special Master made eighty seven (87) Findings of Fact and three Conclusions of Law (R. 35-66) to thirty five (35) of which these respondents excepted. Petitioners were satisfied apparently with all of the Findings made by the Special

Master, and took no exceptions thereto, except to a part of Finding No. LXXXI. (R. 82-5.) Consequently all of the other Findings stand as absolute and binding on the Petitioners, and those not excepted to, fifty two (52) in number, on the Respondents.

The only question presented in this case is whether the ordinance is so clearly arbitrary and unreasonable that it amounts to an improper exercise of the Police Powers. (R. 428.)

SPECIFICATIONS OF ERROR.

The Petitioners make the following Specifications of Error:

1. The Circuit Court of Appeals erred in reversing the judgment of the United States District Court for the District of Kansas.

2. The Circuit Court of Appeals erred in repudiating and nullifying the report and findings of the Special Master (which were approved by the Trial Court) made on conflicting evidence and which by the Circuit Court of Appeals "must be deemed to be presumptively correct."

3. The Circuit Court of Appeals erred in denying the appellees' petition for rehearing.

ARGUMENT.

The Specifications of Error will be presented in the above order. However, it seems more logical to respondents to present the main case under Specification of

Error No. 1 than under Specification of Error No. 2 and that course will be followed.

SPECIFICATION OF ERROR NO. 1.

"The Circuit Court of Appeals erred in reversing the judgment of the United States District Court, for the District of Kansas."

An examination of the majority opinion of Judges Van Valkenburg and Stone shows that the Circuit Court of Appeals made an accurate and thorough analysis of the Master's Findings and of the record in this cause, in the light of the principles of law applicable thereto. From what will appear hereinafter, this Court will observe that the Circuit Court has not disregarded any Findings of Fact made by the Master, but, giving them effect, has preserved carefully the right of the local municipal governing body to exercise its own judgment and discretion on matters involving the safety of its people, inherent in the American theory of government and has concluded that the action of the Mayor and Council of the respondent City of Marysville, Kansas, in passing Ordinance No. 350, was not unreasonable and arbitrary.

The opinion says:

> "The recital of the Master and his conclusions with respect to the danger from fires in spite of all possible precautions and the employment of safety devices is fully supported by the evidence and the Court decisions dealing with such questions." (R. 421-2.)

This statement is supported by Findings of the Master set out at R. 420-421, and authorities cited at R. 422.

That the Circuit Court of Appeals considered carefully the physical facts and circumstances is shown by the Master's Findings set out in the opinion. (R. 422-5.)

That the Circuit Court of Appeals considered all of the objections urged by these petitioners and all of the points urged in support of the unreasonableness of the Ordinance is shown by their being set out in full in the opinion. (R. 425-6; R. 431-2-3.)

That the Circuit Court of Appeals distinguished between Findings of Fact material to the issues and mere conclusions made by the Master which tend to support his recommendations but which had no basis and which are inconsistent with other Findings, is shown by a careful analysis made in the opinon, and that the Circuit Court of Appeals has decided this cause in accordance with the law and the evidence will clearly appear from a consideration of the points hereinafter discussed.

I.

The Ordinance: Its Object and Purpose.

The manifest purpose of Ordinance No. 350, is to protect life and property from damage which may result from fire or explosion at the storage supply stations of oil companies and others, located in the City of Marysville. For this purpose, it seeks to regulate the keeping or storing of gasoline and kerosene and other products mentioned in Section I. It does not prevent Petitioners

from maintaining their tanks within the city; it does not require them to "bury" the tanks; it does not require them to move them out of Blocks 40 and 71; it does not prohibit the carrying on of Petitioners' business in Blocks 40 and 71, or in the City of Marysville. *It merely directs the manner in which gasoline and other petroleum products shall be stored within the city,* and to this end states that the storage shall be in "tanks, barrels, or other containers which shall be buried at least three feet underground." If the Petitioners' tanks are such that they cannot be buried, and it must, therefore, provide other tanks, that objection goes merely to the inconvenience or loss to which it is put—a question which will be discussed hereafter. The ordinance is uniform, applying alike to all persons, etc., storing the products in the quantities designated.

It was not enacted on the theory that above-ground gasoline storage is a nuisance *per se*. If it had been, the council would have required the businesses to be moved outside the city limits. If that were the theory, no ordinance would be necessary, for the city under its general powers could bring an action to abate the business or tanks as a nuisance and thus suppress or prohibit them. (*State v. Cozad*, 113 Kan. 200.) In that and similar cases it was sought to prohibit, not regulate. No legislative body had exercised any police power; no governing body had exercised its discretion and in its judgment declared that a storage of certain products in quantities and under the surroundings and circumstances should be regulated in the light of local needs and conditions.

So this ordinance, fixing the quantity of gasoline and kerosene and the manner in which it shall be stored is regulatory, not prohibitory, and is based on that power to protect the people and their property referred to in *Mirophy v. United States*, 225 U. S. 623, 56 L. ed. 1229, where it is said:

> "The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations, which because of their nature and location, may prove injurious or offensive to the public * * *. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful."

II.

Judicial Review of the Exercise of the Police Power.

Before discussing the reasonableness of the exercise of the Power in this instance we desire to state some of the familiar principles which govern the Courts in the review of such exercise. That the interests of the individual are subordinate to the public good, and the Constitutional guaranties of security of private property were not designed and do not operate to prohibit the reasonable restriction of its use by legislation enacted within the sphere of the Police Power for the promotion of the general welfare, is too familiar to need bolstering by citation of authorities.

A. The presumption is that the ordinance is valid and the burden of proving it otherwise is on the person asserting it.

One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary (*Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 79; 55 L. ed. 369, 377, and cases cited.)

In Dillon on Municipal Corporations, 5th Edition, Vol. II, Sec. 591, pp. 928-929, it is said:

> "If the ordinance is not inherently unfair, unreasonable or oppressive, the person attacking it must assume *the burden of affirmatively showing* that as applied to him it is unreasonable, unfair, and oppressive. And an ordinance general in its scope may be adjudged reasonable as applied to one state of facts and unreasonable when applied to circumstances of a different character."

The Pierce Oil Corporation v. Hope (*Ark.*), 127 Ark. 38, 191 S. W. 405:

> "It must be, and is conceded that the action of the council in passing ordinances of this character is presumed to be legal until the contrary is made to appear. • • • Every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety."

In *Dessner v. City of Wichita*, 96 Kan. 820, the Court said:

> "The presumption of good intention must be accorded the city in passing the ordinance. The same rules of construction apply as to a statute, and unless

clearly void the enactment must be upheld." (821.) (And, see *Sullivan v. Shreveport*, 251 U. S. 169.)

In *City of Chicago v. Washingtonian Home of Chicago*, 289 Ill. 286, the Court said:

"Whether or not an ordinance is the proper exercise of police power is a judicial question. Is this ordinance a proper exercise of police power? We approach this question under the *presumption of law that the ordinance is valid*, and the rule of law places upon the party attacking an ordinance as an unreasonable or oppressive exercise of the police power the burden to affirmatively and clearly show where the unreasonable exists. *People v. Village of Oak Park*, 266 Ill. 365, 107 N. E. 636. Where two constructions are possible, one which will sustain the ordinance and the other which will defeat it, the court will adopt the construction sustaining the ordinance.

In *Stubbs v. Adamson*, 159 N. Y. S. 751, the Court said:

"But even with respect to ordinances enacted under general, express or implied power the general rule is that, where they purport to be and are obviously enacted in the interest of the public health, safety, or welfare, they are, even though they contain exceptions or exemptions, *presumed to be valid*, and may be declared invalid only when it plainly appears that they do not tend in an appreciable degree to that end and that the power to legislate has been exercised arbitrarily in the enactment of an ordinance which is clearly unreasonable."

B. Review of discretion—wisdom—expediency—harshness and injustice—fair difference of opinion, etc.

The constitutional guaranties admit of the exercise of a wide discretion and only avoid those acts which are destitute of a reasonable basis and are purely arbitrary (*Lawton v. Steele*, 152 U. S. 140, 38 L. ed. 385.) Nor will courts inquire into the expediency, nor overthrow an enactment because it differs from the law-making power as to the efficiency where opinion may be divided on that question (*Union Oil Co. v. Portland*, 198 Fed. 441.) Nor will harshness, injustice or the oppressive character invalidate, if within the legitimate sphere of the police power (*Mo. Pac. R. Co. v. Humes*, 115 U. S. 520; 29 L. ed. 463.) Nor is the action invalid because the facts may be disputed or opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrarity. (*Rast v. Van Deman*, 240 U. S. 342.) The City Council has a wide field of choice and if the ordinance is aimed at the evil, and hits it presumably where experience shows it to be most felt, it is not to be upset by thinking up and enumerating other instances to which it might have applied (*Keokee Cake Co. v. Taylor*, 234 U. S. 224, 58 L. ed. 1288.) Nor does the fact that the general form of the ordinance embraces some innocent objects invalidate it or remove such object from its grasp (*Pierce Oil Corporation v. City of Hope*, 248 U. S. 498, 63 L. ed. 381, 3; *Purity Extract and Tonic Co. v. Lynch*, 226 U. S. 192, 204, 57 L. ed. 184, 8.)

The rule in Kansas, is well stated in the *City of Emporia v. Railway Company*, 88 Kan. 611:

"The courts have no supervisory power over the policy of municipal legislation. They can only interfere to curb action which is *ultra vires* because of some constitutional impediment or lack of antecedent legislative authority, or because the action is so arbitrary, capricious, unreasonable and subversive of private right as to indicate a clear abuse rather than a *bona fide* exercise of power." (614.)

And in *Desser v. City of Wichita*, 96 Kan. 820:

"Those who pass ordinances for a city, like those who enact statutes for a state, are primarily the judges of what reasonable requirements are, and it is not for the court to interfere unless and until it appears beyond question that the things done was not a use but a misuse of power." (824.)

In *Stubbe v. Adamson*, 159 N. Y. S. 751, it is said:

"No case, however, has been cited, and we have found none, in which the courts have undertaken to review the action of the local legislative body, depending on a controverted question of fact with respect to its jurisdiction to enact the ordinance. In such cases it is presumed that the legislators have investigated the facts and in enacting the ordinance have exercised the discretion conferred upon them by the legislature in accordance with their determination with respect to the facts and applied what they deemed to be the appropriate remedy * * *

"The validity of a statute or ordinance or its applicability, is not to be decided upon what has been or is being done, but what may be done, and not by its effect in a particular case, but upon a consideration of its general purpose and its efficacy to effect that end. While a question of fact arises with respect to the efficacy of oil separators and with respect to the danger from fire and to health arising from gasoline in

the public sewers, yet it appears by uncontroverted evidence that a separator, if used, will tend to minimize these dangers, and, therefore, I think as a matter of law the ordinance must be sustained even if it be regarded as an ordinance merely."

In Dillon on Municipal Corporations, Sec. 600, page 943, the author says:

"In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy."

In *Curtis v. City of Los Angeles*, 156 Pac. 462, it is said:

"Also, it may be noted that, when ordinances such as the one here in question are asserted to be unreasonable and oppressive upon the very face of the instrument and without other evidence than the terms of the ordinance itself, courts have shown the uttermost liberality and gone to great lengths in upholding such enactments if any substantial reason can be thought out in their justification, and very properly have the courts done this because the power thus to regulate rests with the legislative branch of the government and with its exercise the courts are naturally most reluctant to interfere and do not interfere unless the occasion presents a clear invasion or denial of a legal right."

In *Pierce Oil Corporation v. Hope*, 127 Ark. 38, 191 S. W. 405, Ann. Cas. 1918E, 143, it was said:

". . . . While the action of the council is subject to judicial review, yet, insofar as a discretion abides as to the manner and extent of the use of the power conferred by the statutes, that discretion is to be exercised by the counsel to which the power is con-

ferred, and not by the court which reviews its action, and the court may set aside the action of the council only when they can say that the council has acted in an arbitrary and unreasonable manner.

"Every intendment is made in favor the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and it is not the province of the court, except in clear cases to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people of the community."

(*Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. ed. 169.)

In *Hartman v. City of Chicago*, 282 Ill. 511, 118 N. E. 731, it is said:

"A court will not hold an ordinance void as unreasonable where there is room for a fair difference of opinion on the question, even though the correctness of the legislative judgment may be doubtful and the court may regard the ordinance as not the best which might be adopted for the purpose."

In the case at bar the Trial Court says, in his opinion, that:

"I am of the opinion no other decree can enter in the consolidated case than that by the Master recommended. In these, from all the study I have given the question, from all the proofs, I am of the opinion the danger attendant upon gasoline and kerosene kept in large tanks buried underneath the ground, as by the ordinance required, would be much more hazardous to the adjoining property owners, and their lives and habitations than like tanks above the ground as kept by the plaintiff in this case."

In this case the Trial Court has overlooked the fact that ordinances which have been prepared and adopted by a city council will not be benefited by having the judges of the Federal Court substitute their judgment for that of the city council and attempt to revise them with respect to individual cases. (See *Zahn v. City of Los Angeles*, 274 U. S. 325, 47 Sup. Ct. Rep. 594.)

C. Police power is continuing, cannot be bargained away, and inconvenience or loss due to its exercised does not invalidate it. Therefore, Petitioners have no vested rights.

The first contention is that the ordinance deprives the plaintiffs of certain rights with which they have become vested by reason of a long continuance in the business affected by the ordinance. Petitioner, The Sinclair Refining Company, claims under a permit granted to one J. H. Riepen in 1910. Petitioner, The Standard Oil Company, claims under a continued and undisturbed occupancy for several years, but never asked or was granted any permission.

This contention has never found favor with the courts. A few references to leading cases will be sufficient. In the *case of Mugler v. Kansas*, 123 U. S. 623, it was claimed that, because Mugler had been engaged in the business of making beer for a long time, the Kansas Prohibitory Law invaded his vested rights when it bade him stop, which, of course, was decided adversely to his contention. Other leading cases on the subject are The Slaughter House cases, 111 U. S. 746; *Hadacheck v.*

Sebastian, 239 U. S. 394; and the Oleomargarine cases, 8 Sup. Ct. 922. As was said in the Hadacheck case:

> "A vested interest cannot be asserted against it because of conditions once obtaining. *Chicago & A. R. Co. v. Tranbarger*, 228 U. S. 67, 78, 59 L. ed. 1204, 1211, 45 Sup. Ct. Rep. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground, and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus. * * * The right to exercise the police power is a continuing one and private property and business is always subject to the legal exercises thereof."

In *Union Oil Company v. City of Portland*, 198 Fed. 441, an ordinance designated:

> "Places where fuel or light oil may be stored for sale and distribution,"

and prohibited its storage elsewhere. An oil company purchased a tract where storage was permitted and prepared to build their storage. The council then repealed the first ordinance and passed another so as to include complainant's property in the restricted district. This was upheld, the Court saying:

> "The contemplated construction of complainant's plant was no doubt the immediate cause of repeal; but it was not done to oppress or discriminate against the complainant, but for what the council deemed

the public welfare. By the passage of the ordinance the council did not exhaust or bargain away the Police Powers of the city, or deprive itself of the right to repeal such ordinance if, in its judgment, the public interest required. Nor was it estopped from doing so because the complainant had taken up an option previously acquired and expended money in making preparations for the erection of its plant within the territory described therein. The right to exercise the Police Power is a continuing one, and private property and business is always subject to a legal exercise thereof." (See *Hadacheck v. Sebastian*, 239 U. S. 394; 60 L. ed. 348.)

In *Davenport v. City of Richmond*, 81 Va. 636, 59 Am. Reports 694, an ordinance was held valid requiring the removal of a powder magazine from a city, although the city had sold the sites to the owners for the purpose of erecting such magazines. The court followed the familiar rule that a municipal corporation cannot by contract or otherwise abridge its legislative powers.

In *City of Chicago v. Washingtonian Home of Chicago*, 289 Ill. 286, 124 N. E. 416, the court said:

> "A power within the police power of a city may be reasonably exercised even though such exercise may result in inconvenience or loss to the individual. * * * All uses of property or courses of conduct which are injurious to the health, comfort, safety and welfare of society may be prohibited under the sovereign power of the state, even though the exercise of such power may result in inconvenience or loss to the individuals. In this respect, individual rights must be subordinate to the higher rights of the public."

In *Commonwealth v. Nolan* (Ky.) 224 S. W. 506, the court said:

> "A municipal ordinance designed to protect the safety and health of the public and necessary to its protection will not by the court be declared *invalid* merely because its enforcement will inconvenience a single person, a number of persons, or an entire community of persons." (507.)

It is clear, therefore, that the mere granting of a permit to locate the plants of the Petitioners, did not give them a vested right or deprive the city of its right to exercise in a lawful way its power to protect the life and property of its citizens.

D. The Ordinance applies alike to all under similar circumstances and is not discriminatory.

The Master finds (No. XLIII and LXVIII, R. 46, 58) the Ordinance discriminates in favor of those who store less than 500 gallons of crude, fuel oil and against those who store 501 gallons; and against those who store 5 gallons in one container or 10 gallons or more above ground. Exception to these findings were taken by the defendants both upon the ground that they incorrectly interpret the ordinance and upon the ground that the reference to Ordinance No. 237 is not within the issues presented by the pleadings and an unwarranted conclusion. The latter question will be presented in another connection.

In arriving at a proper conclusion upon the questions of discrimination because of the classifications established,

we have for our guidance the rules long established by the United States Supreme Court which are so succinctly put in *Lindsley v. Natural Carbonic Gas Company*, 220 U. S. 79, wherein it is said:

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification is such a law is called in question, if any state of facts reasonably can be conceived, that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachtel v. Wilson*, 204 U. S. 36, 41, 51 L. ed. 357, 359, 27 Sup. Ct. Rep. 243; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921; 30 Sup. Ct. Rep. 676; *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 251, 256, 52 L. ed. 195, 197; 28 Sup. Ct. Rep. 89; *Munn v. Illinois*, 94 U. S. 113, 132, 24 L. ed. 77, 86; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 615, 43 L. ed. 823, 831, 19 Supt. Ct. Rep. 553."

Considering the nature of the product in which we are dealing (Finding LXXXI, R. 62), it cannot be said that no reasonable basis exists for classification. Petitioners' leading expert, Dr. Cross, testified that he considered even

5 gallons of gasoline inside a building extremely dangerous. He also testified that the hazard of petroleum products increased in direct proportion to the quantity. (R. 130, 377.) But such a subject does not require the knowledge of an expert. The court knows fully as well as the most eminent chemist that the more gasoline at a fire or an explosion, the greater the fire or explosion and resulting damage and the same is equally true of the heavier fractions of petroleum such as fuel oil or distillate.

The ordinance recognizes this significant fact and realizing that the commodities dealt with are necessities in use in the every day life makes the concessions that in the smaller quantity the safeguards set may be relaxed. In order for a court to say that the ordinance was unconstitutional because of this classification, it must be convinced that the classification is utterly devoid of reason. It may be, although we do not concede it, that the line drawn on the quantities "is not made with mathematical nicety" or "in practice results in some inequality," but, before it can be declared void, it must be found to be without any reasonable basis. It may be that the line should have been placed a few gallons more or less on some of all of the commodities, but we insist that it is founded upon the premises stated by Dr. Cross that the hazard increases in direct proportion in the quantity and almost any classification so grounded would be reasonable.

The argument is made that 499 gallons is just as dangerous as 501 gallons and reasoning from that statement Petitioners conclude that the classification is without

reasonable basis. An illustration occurs to us which we believe demonstrates the fallacy of the argument. Our speed law provides that it shall be unlawful to drive an automobile faster than 35 miles per hour. Obviously, an automobile driven at 34 miles per hour would kill one just as quickly as one driven at 36 miles per hour, but surely no member of the bar who valued his opinions would be heard to say that the speed law was unreasonable for that reason.

Distillate and fuel oil not being nearly so dangerous as gasoline and kerosene (Finding No. LXXXII, R. 63), it is reasonable to classify the former on a 500-gallon basis and the latter on a 10, and for reasons just outlined it is reasonable to require 500 gallons or more of fuel oil to be stored underground and to require 10 gallons or more of gasoline or kerosene to be stored underground. The ordinance applies equally to all persons, firms or corporations who keep and store like amounts of gasoline and kerosene on the one hand, or like amounts of distillate and fuel oil on the other. The ordinance applies alike to all persons under similar circumstances and conditions and is not discriminatory.

Southern R. R. Co. v. Green, 216 U. S. 400; 54 L. ed. 536;
Williams v. Arkansas, 217 U. S. 79;
Mo. Pac. R. R. Co. v. Mackey, 127 U. S. 209;
Heisler v. Thomas Colliery Co., 260 U. S. 245.

The old familiar plea of oppression of a foreign corporation is conspicuously absent in this case. There is no claim made that the ordinance is inequitably enforced

or unfairly administered. On its face the ordinance applies to all persons of a class with the same force and the City has undertaken to enforce it fairly and impartially, but up to date the City has succeeded in enforcing the ordinance only as against one Fenwick, a local citizen.

We think that Judge Van Valkenburg applied the law correctly in stating:

> "It is no valid objection that small tanks containing distillate and fuel oil, which are found by the Master to be not nearly so dangerous as gasoline and kerosene, are permitted by the ordinance to be stored above ground. The classification made is sufficiently distinctive. The large storage tanks of appellees, and the nature of their business, may not legitimately be compared with private consumers or those engaged in small retail business. All possible hazards cannot be eliminated in any community." (R. 431.)

E. Petitioners have no standing to question ordinance on imaginary situations which are not being applied to their disadvantage, or on behalf of other classes of persons making no complaint.

Petitioners showed unusual interest in urging contentions for classes not represented and not complaining and whose rights are not the same character under the ordinance as are the Petitioners. The findings of the Master are erroneous in the light of the familiar principle that only those can complain who are affected by an alleged unconstitutionality, and only in the manner complained of.

As was said in the case of *Clark v. Kansas City*, 176 U. S. 118.

> "The Court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect * * * ."

Again in The Winebago, 205 U. S. 354, the Court said:

> "This Court does not listen to objections of those who do not come within the class whose constitutional rights are alleged to be invaded or hold a more unconstitutional cause, as against the class making no complaint, the law might be so held."

And in *Milling v. Bondurant*, 257 U. S. 289:

> "A litigant can be heard to question a statute's validity only when and so far as it is being applied to his disadvantage."

The Master found (No. XXXI, R. 44) that tanks of gasoline do not present a greater hazard than would a frame building or a stock of groceries in a frame building. The record doesn't show that the Petitioners operate grocery stores or that they or anyone else is complaining about regulations as to the construction of frame buildings. And in any event the record does not show that proper regulations are not in force to assure safe construction of frame buildings. (R. 218.)

The Master also finds (No. XLII, R. 46) that it is unlawful under Ordinance 350 for any citizen of Marysville to keep more than five gallons of gasoline in the tank of his car, or for a garage keeper to store cars, the tanks of which contain gasoline. Finding No. LXXVII (R. 61),

that Ordinance 350 regulates the keeping and storing of gasoline, etc., and not its transportation and use, and Finding No. LXXVIII (R. 61), that neither of the Petitioners operate automobiles for other than transportation, nor operate garages, show clearly that this finding XLII is not within the issues and erroneous.

The Master also finds (No. XL, R. 45) that crude oil is more dangerous to public safety than gasoline or kerosene, and yet any quantity less than 500 gallons can be stored above ground. (No. LXV, R. 57.) Finding No. LXXXII, (R. 63) to the effect that neither of the Petitioners nor anyone else, ever has or now stores crude oil, shows that the above findings are not within the issues and erroneous.

All of the foregoing fall under the condemnation of the rule that the Court deals only with the case in hand, not with imaginary ones (*Yazoo & Mississippi Valley Railroad Co. v. Jackson Vinegar Co.*, 226 U. S. 217.)

In the recent case of City of Shreveport vs. T. F. Wilson, decided Jan. 18, 1928, by the Supreme Court of Louisiana, the Court met similar objections in this language:

> "The fact that the ordinances does not forbid several other (more or less far fetched and improbable) methods of delivering gasoline claimed to be (and even being) more dangerous than that which is actually forbidden, does not render it objectionable, or unfair, or arbitrary. The ordinance as it is, applies equally to all other persons as well as to this defendant; and all thos other methods of delivery are equally as open to this defendant as they are to all other persons. So that the ordinance applies equally and impartially to all persons alike. The fact that

a law or an ordinance forbids some things and does not forbid others which it might, or could or should have forbidden, does not render it objectionable as denying any person due process of law or the equal protection of the laws. State vs. Hunter, 164 La. —, 114 South. 76. Such a plea amounts to no more than this, that in the opinion of the pleader the law or ordinance *does not go far* enough, a in which he has manifestly no interest. Thus there is no reason under the sun why a law against gambling with dice should be declared unreasonable, or unfair, or arbitrary, or unconstitutional, because, the legislature had not made it an offense to gamble with cards; and certainly one who has been gambling with dice is in no position to complain that the law is defective because it would not have condemned him had he gambled with cards instead. The fact of the matter is, that the lawmaker is not obliged to make an offense of every infraction of the moral law or of the rules of prudence and common sense and good conduct; on the contrary it is his sovereign privilege to declare *what* sall constitute an offense and to ignore whatever he sees fit."

The pleadings disclose that this action is brought:

> "For the purpose of procuring an order and decree of this Court declaring void Ordinance No. 350 of the Ordinance of the City of Marysville."

No reference is made to Ordinance No. 237 in the pleadings except that Ordinance No. 350 on its face purports to repeal Section 4 of Ordinance No. 237. That is the only reference found any place either in the pleadings or in Ordinance No. 350 to Ordinance No. 237, but the Master concluded that Ordinance No. 237 is a part by reference. This furnished an excuse for Findings XLII and LXVII in which the Master finds that every garage keeper

who stores automobiles, the tanks of which contain gasoline, is guilty of a violation of the Ordinance although he finds in LXVIII that the Ordinance does not pretend to regulate the use or distribution of gasoline but only regulates the storage. We maintain that the issues in this case are framed by the pleadings; that the action is brought for the sole purpose of reviewing Ordinance No. 350 and that Ordinance No. 350 stands or falls by reason of what is contained in it and not by reference to any other ordinance. If the plaintiffs desire Ordinance No. 237 declared void they should have so framed their petition and the findings of the Master relating to Ordinance No. 237 are unwarranted outside the issues in the case and should have been set aside.

III.

The Ordinance Constitutes A Reasonable Exercise of the Police Power.

A. The Findings on their Face Sustain the Ordinance.

Whether or not the exercise of the police power is reasonable in any given situation, depends on whether the means adopted bear a real and substantial relation to the end sought to be attained. This must be considered in the light of the nature of the business or commodity sought to be regulated, the location and surroundings.

We submit that the findings on their face sustain this Ordinance.

In preparing respondents' (then appellants') appeal to the Circuit Court of Appeals, Eighth Circuit, counsel prepared an analysis of the Master's Findings. We found it convenient, and with the hope that it might lessen the labor of this Court and assist it in the consideration of this cause, we respectfully set it out for convenience of reference:

ANALYSIS OF FINDINGS OF SPECIAL MASTER.

Findings general in character and Findings supporting Master's conclusions.	*Finding Numbers*		Findings inconsistent with Master's and supporting validity of Ordinance (including comment as to certain particular Findings.)	*Finding Numbers*
Corporate existence, residence, and other jurisdictional findings.	1	5	No controversy.	
	2	48		
	3	49		
	4	50		
That gasoline and kerosene stored in violation of Ordinance.	8	14	No controversy.	
	52	76		
	13	79		
Ordinances and their passage.	11		No controversy.	
Description of equipment, tanks, and devices.	13	57	No controversy.	
	15	72		
	52	73		
	53			
Defendants have caused arrest of plaintiffs' agents and will enforce penalties unless enjoined.		46	No controversy.	
		80		
Operation of Appellees business by license without complaint from but with acquiescence of city, etc., (Claim of vested right).	6	20	Constitute no equity—because Police Power is continuing, cannot be bargained away, and operation of private business is subject to its legal exercise even though loss and inconvenience result. (Brief P. 14.)	
	7	51		
	8	52		
	9	55		
	10			
Tanks cannot be buried and operated.	27	58		
		59		

SUBJECT MATTER.		Finding Numbers
Tanks in Marysville equipped with best and most modern safety devices, sufficient to carry off vapor under extreme heat and have been operated carefully and prudently; operated without fire, explosion or accident.	16 17 53	54 18 74
No fire, accident or explosion of any tank similar in character to tanks in question.	19	26
Standard tanks at Marysville similar to those it uses generally; Standard had only 66 fires at 12,000 similar tanks in 5 years and only one caused loss of life and damage to property; and that was not equipped with manhole vent similar to its tanks at Marysville.	21 22 23	24 25
Tank safe from standpoint of public safety.		31
Underground storage more hazardous than above ground.	28 45	60

NATURE OF COMMODITY.	Finding Numbers
Gasoline and kerosene highly inflammable and combustible and are dangerous and hazardous; both vaporize in contact with atmosphere, and will ignite on contact with flame or spark, and mixed in proper proportions with atmosphere will explode with disastrous results.	
Gasoline highly volatile, and will flash at ordinary room temperature; gasoline and kerosene can be handled so as to avoid fire and explosion, and it is generally true that where kept in tanks such as used by plaintiffs, and equipped in same manner, they will burn only at the vent openings and will not explode when heat is applied—Yet—gasoline and kerosene are of such a character that even when most modern safety devices are in use, a relaxing of conditions, a careless act, or an accident or failure in the operation of the safety devices, or the presence of extreme heat, may result in fires or explosions most destructive to life and property.	81
The record shows fires at 5 storage stations in Kansas, 2 in 1919, 2 in 1922, 1 in December, 1923.	81
The McCracken and Greenleaf fires were at tanks of the Sinclair Company, equipped with McDonald Duplex Vents and loose manhole covers, the same or similar to those of the Company at Marysville, and at McCracken the top of the vertical gasoline tank was blown out and the kerosene tank exploded and was lifted off the foundation and thrown to the ground fifteen feet therefrom.	
At Hays, Kansas, November, 1919, tanks of Standard containing gasoline and kerosene burned and exploded, one end of the gasoline tank was blown out against an elevator 82 feet away, which it burned completely. The main part was hurled in the opposite direction 475 feet breaking an 8-inch spruce tree	

SUBJECT MATTER. Underground storage, etc. (Continued)	Finding Numbers	NATURE OF COMMODITY.	Finding Numbers
		enroute, burning several dwelling houses, killing nine people and wounding at least 26 more.	
		Fires at storage stations have occurred which so heated contents as to burst open seams, let gasoline run out in burning, flowing flame, igniting other property 30 to 60 feet way; at others, flames shot into air 50 to 100 feet high and swept by wind set fire to and burned property 60 to 75 feet away.	81
		Danger of fire to warehouses adjacent to storage tanks is great on account of oils, greases, and petroleum products stored therein, which are highly combustible and easily ignited and difficult to extinguish.	81
		Many instances have occurred where warehouses and storage tanks have become ignited by backfires from automobile trucks, sparks from gasoline engines used to pump products to and from storage tanks; sparks from static electricity created by abrasion of metallic bodies, or otherwise, in which cases tank wagons and smaller barrels and containers of petroleum products in warehouses have exploded. Such fires produce extreme heat around storage tanks, have broken connections or *melted off valves* thus permitting the gasoline to flow out of the tanks and burn, adding to the fire and intensity of the heat, and in those cases *should a safety device fail to operate or should more gas pressure be formed than venting devices could relieve, an explosion would occur.*	81
		Danger from fire or explosion due to lightning which causes a great many fires in oil storage is less in underground tanks than in above-ground tanks.	84
		Danger from fire or explosions due to static electricity is less in underground tanks than in above.	85
		Base rate of insurance on storage tanks of gasoline and kerosene underground is 50% of base rate of tanks above ground.	86

SUBJECT MATTER	*Finding Numbers*
Tanks not located within fire limits	12
Tanks located in sparsely populated part of city.	29

Finding Numbers

Reference is hereby made to findings 61-62, (Tr. 50-56), too lengthy to set out, but which show in substance that:

The Sinclair Tanks are located in the South half of Block 71; 10 feet from frame warehouse in which is stored oils, greases, etc., and which houses gasoline motor to pump the liquids; 16 feet from Riepen's frame out buildings; 27 feet from frame barn and other sheds; 58 feet from Riepen's modern residence; 75 feet from a 130x16 foot frame coal shed, containing large quantities of coal; that on the six lots in this half block there are five occupancies and a railroad right-of-way; that there are houses and buildings all around this location; that within 100 feet are one residence, six storage tanks with a capacity of 75,000 gallons, three warehouses, three outbuildings, and 130 foot coal shed; within 200 feet there are five residences, the same six storage tanks and warehouses, seven barns and outbuildings, and the 130 foot frame coal shed; within 400 feet there are 17 residences, a large ice plant, the same storage tanks, warehouses and coal sheds and 11 barns and other buildings; and within 500 feet there are 21 residences, a carpenter shop, ice plant, and the same tanks, warehouses, and coal sheds and 20 barns, garages, outbuildings and other structures. 61

The Standard Tanks are located in the South half of Block 40; 10 feet from frame warehouse storing oil and greases and housing gasoline motor for pumping; 17 feet from 14x22 foot frame building; 26.7 feet from wooden coal bins 105 feet long by 12 feet wide largely filled with coal; 83 feet from a residence right beyond the coal sheds and 99 feet from one on the south, with a 2½ story hotel 40x80 feet, 145

SUBJECT MATTER	*Finding Numbers*
Tanks located in, etc. (Continued)	
	feet away on the other half of the block, and two blocks from the Main street of a city of 4,200 people; on the southwest corner of the same block is a two story frame residence—one of the best homes in the city; and on the northwest corner of the same block is a residence which took a first prize for beautiful homes in a city contest. The location is surrounded by residences, business buildings, and other structures; within a radius of 100 feet there are a residence, warehouse, frame tool house, and 105 foot frame coal bin; within 200 feet are four residences, two hotels, a cement block works, six other buildings and the same warehouse, tool house, and coal bin; within 400 feet there are 19 residences, three hotels, the same warehouse, tool house, ice plant, cement block factory, three business buildings and 20 barns, garages, and other outbuildings, and within a radius of 500 feet there is practically all of the property in blocks 40, 21, 22, 39, 52, 51, 50 and 40, as set out in this finding. 62
No changed conditions to justify requirement of ordinance that tanks be buried.	30 63
	Until July, 1918, City of Marysville had population of 2,000; at that time shops and general offices of St. Joseph, Grand Island Railway Company were moved to Marysville, it was made a division point by the Union Pacific Railway Company; thereafter the population increased materially and is now (1924) over 4,200.
	Since above there has been and now is shortage of residences and building activities both in residence and business property have been considerable. 69
	During summer of 1923, Sanitary Sewer System extended through center of block 71, and other territory in vicinity of plaintiff's tanks. 69 70

SUBJECT MATTER.	*Finding Numbers*
No changed conditions, etc. (Continued)	
During summer of 1923, and since, brick paving on Sixth Street from Elm Street to Jackson (Sixth Street is western boundary of Block 40, and Eastern Boundary of Block 71), and on Elm Street from Sixth Street east to 16th Street (Elm Street is Northern Boundary of Block 40, Ex. A and H.	70
Numerous sidewalks have been constructed and graded in vicinity of Block 40.	70
Prior to 1918, Block 49 was a Ball Park—now (1924) it contains 8 residences and a number of outbuildings (Plts'. Ex. H).	70
Some of residences in proximity of Block 40, have been built in recent years, there being one in 1920, also one remodeled, both in South half of Block 40; new house under construction in North half of Block 51, and two houses built recently in Block 50 (Plts'. Ex. H).	71
Riepen house in Block 71, has been remodeled.	71
Reasonable to conclude that with extension of paving on Sixth Street and construction of sanitary sewers built recently, more residences will be built in the immediate vicinity of Block 71.	
That a great many of the building sites and locations that now are unoccupied by residences are in Southwestern part of Marysville, and generally speaking all of the territory for a distance of many blocks is built up with residences and there is not much property vacant for building site in that direction.	71

SUBJECT MATTER.			*Finding Numbers*
Tanks present no greater fire hazard than would a frame building or stock of groceries in a frame building at same location.			31
Crude oil may be stored in tanks above ground under authority of Ordinance No. 350, and is greater hazard than gasoline or kerosene.	39	65	49
Unlawful to keep more than 5 gallons of gasoline in auto tank and every garage keeper who stores cars with tanks of that capacity violates the ordinance.	42	67	

	Finding Numbers
At Hays, Kansas, November, 1919, tanks of Standard containing gasoline and kerosene burned and exploded, one end of the gasoline tank was blown out against an elevator 82 feet away, which it burned completely. The main part was hurled in the opposite direction 475 feet, breaking an 8-inch spruce tree enroute, and wounding at least 26 more. (Would like to see a stock of groceries do this)	81
Standard and Sinclair do not now and never have stored crude oil in said tanks, nor is crude oil stored by anyone in Marysville. (Also, see Br. 31-2.)	79
Ordinance No. 350 does not pretend to regulate the transportation or use of gasoline and kerosene, but regulates only the keeping and storing of said products.	77
Neither Standard Oil Company nor Sinclair Refining Company operates any automobiles in the City of Marysville, for any purpose other than the transportation of petroleum products nor does either of them own, operate, or maintain a garage in the City of Marysville.	78
The above items, Nos. 16, 17, and 18, constitute no equity account raising questions as to matters not being applied to disadvantage of Appellees and imaginary contents not within the issues. (See Br. 21.)	

SUBJECT MATTER	*Finding Numbers*		*Finding Numbers*
Fuel oil and distillate, tanks of 100-500 gallons capacity are maintained under authority of Ordinance No. 350.		38	Distillate and fuel oil not nearly so dangerous as gasoline and kerosene. 82
Discrimination:	43	87	Items Nos. 19 and 20, constitute no equity because the ordinance applies equally to all persons, firms and corporations under similar circumstances and conditions. (See Br. 17.)
In favor of those storing crude, distillate and fuel oil in quantities of less than 500 gallons above and against those who wish to store 501 gallons or more and against those who wish to store 10 gallons of gasoline or fuel oil or motor spirits in one container, or 10 gallons or more of gasoline, kerosene, or naphtha above ground.	68	47	
Location of property near tanks; closest dwelling house to Standard tanks is more than 90 feet distant.	32	33	Frame warehouse, 10 feet away, where lubricating oils are stored; frame tool house 14x22 feet, 27 feet away; 26-7 feet away are frame coal bins 105 feet long and 12 feet wide, constructed of dry lumber, in which large quantities of coal are stored; west of coal shed is a frame residence, 93 feet from tanks, i. e., 66 feet from sheds. 61-Para. A Residence in block 51 is 92 feet 2 inches distant 62-Para. H
Not more than 5 gallons of gas, fuel oil, or motor spirits can be stored or kept above ground, in any one container, and not to exceed two containers on a premise under Ordinance No. 237, whereas under No. 350, quantity which can be stored and kept above ground is less than 10 gallons.		41 66	Constitutes no equity, not within the issues. (Br. 21.)

SUBJECT MATTER.	*Finding Numbers*
Gasoline, Kerosene, or Naphtha: 10 gallon quantities must be in two containers of 5 gallons each in any building or premises, but in excess of 10 gallons buried 3 feet under-ground; 500 gallons of crude oil, distillate or fuel oil may be stored 3 feet underground; unlawful to store more than 10 gallons of gasoline or kerosene above ground or more than 500 gallons of crude oil, distillate or fuel oil above ground.	75
Standard station on right-of-way of U. P. Railroad Company.	
Large quantities of cinder have been used as ballast on U. P. Tracks which are about 20 feet from the plaintiff's station.	35
Natural flow and drainage from U. P. tracks is upon and over Standard Oil property.	37
The action of water upon cinders creates acid that corrodes and otherwise injures steel.	36
Objections to storing in tanks buried underground are that maintenance is very difficult; should leaks occur they not be discovered and contents might penetrate through the earth, getting into sewers, wells, and basements, and contaminate water and cause explosions.	83

	Finding Numbers
Statement of Ordinance requirements as to storage of various quantities.	
Corrosion: Conditions which produce corrosion of metal underground or acids in soil combining with oxygen and moisture; sulphuric acid is dangerous and explosive; conceding all of acid in the soil at the property of the Standard Oil Company in Block 40, as sulphuric acid, it tests .049 to .07 per cent acid; and at the Sinclair property in Block 71, it tests .025 per cent acid. Although there is more chance of corrosion of metal underground, at the Standard Oil property, it *might* take a term of years for it to occur.	34
	83-Par. B
A. Electrolysis: Conditions which produce electrolysis are not present in the City of Marysville nor in blocks 40 and 71.	83-Par. A
B. Corrosion: Conditions which produce corrosion of metal underground are acids in soil combining with oxygen	

SUBJECT MATTER.	Finding Numbers
Such leaks would develop through effect electrolysis and corrosion eating out metal of the tanks, vibration, and temperature changes loosening the seams, and by tanks being floated out and breaking connections.	83

	Finding Numbers
and moisture; sulphuric acid is dangerous and explosive; conceding all of acid in the soil at the property of the Standard Oil Company in Block 40, as sulphuric acid, it tests .049 to .07 per cent acid; and at the Sinclair property in Block 71, it tests .025 per cent acid. Although there is more chance of corrosion of metal underground at the Standard Oil property, it *might* take a term of years for it to occur.	83-Par. B
C. Vibration: Under conditions existing in and around blocks 71 and 40, there would be vibration that *might* weaken the seams in tanks buried underground.	83-Par. C
D. Temperature Changes: Seams of tanks underground *might* be weakened by temperature changes to such an extent as to cause the tank to leak, but such tanks are subject to less changes in temperature than tanks above ground.	83-Par. D
E. Floating: Tanks buried under three feet of ground in Block 71, have not floated out during periods of very heavy rainfall and any danger of floating can be overcome by proper drainage of surface water by mounding up the earth and by weighting, strapping, or anchoring down the tanks.	83-Par. E
F. Seepage: Tanks buried in compliance with ordinance would rest on a level 13 feet below ground; sewers in Blocks 71 and 40 are 10½ feet below ground level; there are no wells in the vicinity; the soil in Blocks 71 and 40 is heavy black gumbo shading	

SUBJECT MATTER.	*Finding Numbers*
Such leaks would develop, etc. (Continued)	
gradually into compact plastic yellow clay; the tests made thereof, by attempting to force water through same by exerting a pressure of 14 lbs. per square inch for 2½ hours showed only a few small drops of water coming through; and same tests with gasoline, no gasoline came through.	83-Par. F

1. Nature of the business and its Commodity.

Counsel would have one believe that gasoline and oils do not explode, but concedes that the gas or vapor, under proper circumstances, will explode. They seem to base the case on the fact that explosion is the only danger and that the hazard of fire is, although present, negligible—that is to say, that while the employees of the appellant company, in selling the commodity, emphasize its great motive power because of its highly volatile and inflammable nature and low flash point, yet the Company, in order to resist the regulation of such an Ordinance, would have one believe that the same commodity would not even burn or explode. This is both contrary to scientific fact and the experience of mankind.

Petitioners kindly make this admission in their brief when they say that:

> ". . . City officials and individual citizens know generally that gasoline and kerosene at times emit explosive vapors and . . . are influenced by the general belief that underground storage will lessen the danger incident thereto . . ." (Petitioner's Brief page 13.)

As evidence of the fact that the courts have many times recognized the dangerous character of petroleum products, we invite the court's attention to the following citations. The most modern vents and equipment may be used, but the court will take judicial notice of human fallibility and that accidents occur in the operation of the most perfect mechanisms. (11 R. C. L. 660; 12 A. L. R. 1305.)

> "We may also concede in the instant case, every precaution that human ingenuity has conceived has been made in the construction of the tanks as testified to by defendants' experts considering, however, the dangerous character of the substance and its power as an explosive of which in this age * * * we can well take Judicial notice, and also considering human fallibility that accidents in the operation of the most perfect mechanism will occur and all that needs to change what is a harmless agency, when properly protected, to a most dangerous explosive, is a careless person, can it be said that to have 20,000 gallons of such an agency stored within a few feet of one's dwelling house is not sufficient to be an unreasonable interference with the comfortable enjoyment of homes." (*Whittemore v. Baxter Laundry Co.*, 148 N. W. 437 (Mich.) 52 L. R. A. (N. S.) 930.)

Petitioners contend that the citation of this case by the Circuit Court of Appeals is inconsistent with its decision. Not so. The storage of 20,000 gallons of gasoline within a few feet of one's dwelling house was not a nuisance because underground, but because it was there at all, above or below ground.

In *O'Harra v. Nelson*, (N. J.) 63 Atl. 811, the Court reviews the constituents of gasoline, how its vapor will burn and explode, and then says:

> "It cannot, of course, be said that gasoline cannot be handled so as not to cause an explosion, because it is shown to be the scientific fact that if the vapor is blown out of the building by a current of air, then there would be nothing present to explode, and it is also, of course, true that if no flame is ever brought in contact with the vapor, its presence would be harmless. But this is too narrow a margin of safety upon which to predicate a finding that the danger is not

actually imminent. It seems certain that the presence of some flame in this building at some time must be presupposed, and it also seems certain that in the habitual handling of this fluid, which immediately gives off vapor when brought in contact with air, there will gather from time to time in this building this dangerous vapor which will not always be promptly ejected by currents of air.

" • • • But it will be readily perceived that there is a class of things to which this reasoning does not apply—things inherently dangerous, liable to explosion without negligence of the owner, and so subject thereto that the greatest care is but slight assurance of safety. *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.*, 60 Ohio St. 560, 54 N. E. 528, 45 L. R. A. 658, 661, 71 Am. St. Rep. 740.

"Gunpowder and nitro-glycerine are examples of this class, and to a much greater extent are products of petroleum, the vapors from which are insidious, treacherous and almost uncontrollable as respects danger of explosion.

"In the case of *Heeg v. Licht, supra*, it is said: • • • The 'keeping or manufacturing of gunpowder or of fireworks' does not necessarily constitute a nuisance *per se*. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used.

"*If this be the rule with respect to gunpowder, a fortiori should it be applied to gasoline. 'As an explosive,' it is said, 'the danger is ten times greater than that of gunpowder.* It ignites as soon as the blaze is applied to it and becomes explosive when the vapor from it mingles with the atmosphere in which there happens to be a burning lamp or other light.' *Standard Oil Co. v. Tierney* (Ky.), 17 S. W. 1025, 14 L. R. A. 677, 682, 36 Am. St. Rep. 595. • • • It was well said by Chief Justice Thompson of the Pennsylvania Supreme Court, in *Rhodes v. Dunbar*, 57 Pa.

274, 98 Am. Dec. 221, cited with approval in *Rudder v. Koopman, supra:* 'It is not on the ground alone of their liability to fire, primarily or even secondarily, that they may possibly be dealt with as nuisances, but on account of their liability to explosion by contact with the smallest spark of fire, and the utter impossibility to guard against the consequences, or set bounds to the injury, which, being instantaneous, extends alike to property and persons within its reach. The destructiveness of these agents results from the irrepressible gases once set in motion infinitely more than from the fires which might ensue as a consequence. Persons and property in the neighborhood of a burning building, let it burn ever so fiercely in most cases have a chance of escaping injury. Not so when explosive forces instantly prostrate everything near them, as in the instances of powder, nitro-glycerine, and other chemicals of an explosive or intensely inflammable nature."

In *State v. Cozad*, 113 Kan. 200, the Court said:

"It is well settled that the courts may take judicial notice of the inflammable and explosive qualities of gasoline and kerosene * * * ." (202.)

"We may grant that the storage of gasoline on premises adjacent to other adjoining premises is not a private nuisance *per se*. It may, however, become such considering the locality, quantity and the surrounding circumstances and would not necessarily depend upon the degree of care used in its storage." (*Heeg v. Licht*, 80 N. Y. 579; 29 Cyc. 1177.)

In *Waters Pierce Oil Company v. Mayor, etc., of New Iberia*, 47 La. Ann., page 863, 17 So. 343, the Court said:

"The proof sustains the averments in the petition as to the security of the tanks from fire and the prevention of the escape of gas. But we know, from the

character and constituents of petroleum, as we know from the component parts of gunpowder that it is a dangerous and inflammable substance, and, in defiance of all precautions, it will at times ignite. There are certain facts known to mankind that are accepted as true, and the record might be replete with evidence to contradict them, yet we would accept the experience of mankind in preference to the isolated facts recited in the record. No amount of testimony would convince us that steam, electricity, and gunpowder, and petroleum are not dangerous. Due and proper precautions may, under certain conditions, render them harmless, but the conditions may relax, and at unexpected moments they may let loose from restrictions, and burst forth with immeasurable power and energy."

Texas Company v. Robt. (Okla.), 212 Pac. 318, shows a tank struck by lightning and boiling over, with consequent running of flaming gasoline.

Standard Oil Co. of New York v. Patchner, 289 Fed. 678, shows the ignition of vapor by static electricity caused by gasoline flowing through an iron pipe. The cause was attributed to the failure of the tank wagon driver to use the safety chain while loading his wagon from the storage tank.

Newton v. Texas Company, (N. C.), 105 S. E. 433, shows gasoline escaping from a warehouse and running down the street.

Stone v. Texas Company, (N. C.), 105 S. E. 425, shows the explosion of metal drums inside of the warehouse.

Childs v. Standard Oil Co., (Minn.), 182 N. W. 1000, shows a fire resulting from the spilling of a couple gallons of kerosene on the floor.

St. Marys Bill Co. v. Illinois Oil Co., (Mo.), 254 S. W. 735, shows a fire started by engine exhaust communicating to an oil-soaked floor and then to a tank of 10,000 gallon capacity, resulting in the loss of an elevator building.

These statements of the courts are brought out in finding No. 81, set out above, to the general effect that gasoline and kerosene are dangerous and hazardous, under proper conditions will explode with disastrous results, and that even in the face of the most modern safety devices a relaxing of conditions, a careless act, or an accident or failure in the operation of a safety device or the presence of extreme heat, may result in fires or explosions most destructive to life and property; that such disasters are brought about by back fires from automobiles, sparks from pumping engines and static electricity, and similar causes, and as evidenced at Hays, Kansas, the spectacle of a flaming, sizzling, steel tank of 17,000 gallons capacity, shooting through the air like a torpedo a distance of 475 feet breaking an eight inch spruce tree enroute and traveling 225 feet thereafter and leaving a path of killed and wounded, clearly demonstrates why the courts take judicial notice and sustain the proper regulation of businesses which handle such products.

2. Location of buildings and surrounding circumstances.

The Sinclair tanks are 10 feet from a warehouse in which is stored oils, greases, etc., and which houses a gasoline motor, 16 feet from Riepen's frame outbuildings, 27 feet from frame barn and other outbuildings, 58 feet from his house; 75 feet from 130 ft. x 16 ft. frame coal

sheds, containing large quantities of coal; on the six lots in the South half of that block are five occupancies and a railroad right-of-way. There are houses and buildings all around this property. (Finding LXI, Br. —.) And *the Standard property*, 2 blocks from the Main Street of a city of 4,200; 10 feet from frame warehouse storing oils, greases, etc., and housing gasoline motor pump; 17 feet from a 14x22 frame building, 27 feet from wooden coal bins, 105 feet long, 83 feet from a residence right beyond the coal sheds and 99 feet from one on the south with a 2½ story hotel 40x80 feet, 145 feet away on the other half of the block; one of the best houses in the city on the Southwest corner of the block and on the Northwest corner the house that took first prize for beautiful homes. (Finding LXII, Br. —.)

And at this point we ask the Court to examine Defendants Exhibit D, showing the Sinclair Tanks, and Defendant's Exhibit E., H. and I, showng the Standard Tanks and surroundings; and then Defendant's Exhibits 2, 3, 4 and 5, and F. Now with these surroundings in mind, is *there any danger to life and property* from a fire at Petitioners' tanks which would burn box cars 65 feet away as was done at Robinson, caused by static spark created by hitting a pipe with a light bulb? (R. 230-4.) Or from a fire at Petitioners' tanks which swept by the wind, would burn the grass 100 feet from the tanks, as was done at Greenleaf (R. 289), caused by spark from the gasoline pumping engine? (R. 239-40.) Or from a fire at Petitioners' tanks which would ignite by running flaming gasoline, property 65 feet away, and blow a tank 15 feet off its

foundation, as was done at McCracken (R. 241-3), caused by backfire from the motor of the truck? Or from a fire at Petitioners' tanks which would burn to the ground houses 100 feet and 2 blocks away and wreak, destruction to life and property within a radius of 475 feet, as was done at Hays (R. 256, 270-5), caused by backfire in cranking a motor truck? Or from a fire at Petitioners' tanks due to vapor therefrom creeping 160 feet away, igniting and traveling in a sheet of flame back to the tanks, as Mr. Boehmer, Petitioners' expert, testified to? (R. 295.)

The Findings also show that the population of the City of Marysville has increased from 2,000 to 4,200 since the moving of the main offices of the St. Joseph and Grand Island Railroad Company to that place four or five years ago, since which time building activities, both in residence and business property, have been considerable (No. LXIX, R. 58-9), also that, generally speaking, all of the territory north and northeast of Block 71 is built up with residences and there is not much vacant property for building sites in that direrction, and that a great many of the building sites and locations now unoccupied are in the southwestern part of Marysville, (Finding LXXI, R. 59); also that during the summer season of 1923, sanitary sewer systems were constructed through the alleys in Blocks 71, and Block 70 and along Sixth Street, and that paving was constructed on Sixth Street, which borders Block 71 on the East and Block 40 on the West from Elm Street to beyond Oak Street, and on Elm Street, the Northern boundary of Block 40 (Finding LXX, R. 58); numerous sidewalks have been graded and on-

structed (Finding LXX, R. 58), that some of the residences in the proximity of Blocks 71 and 40 had been built in recent years, and that it was reasonable to conclude that because of these facts, there would be development and a building of more residences in the vicinity of Block 71. (Findings LXX, LXXI, R. 58-9.)

3. The Record shows that Dangers from Leakage are Negligible.

These facts alone convince as to the reasonableness of this ordinance. And yet we are confronted with the findings that underground storage is more hazardous than that aboveground (Finding XXVIII, XLV, LX, R. 43, 46, 50), presumably on account of leakage.

The reasons advanced are that should leaks occur underground the contents might penetrate through the earth, get into sewers, wells and basements and cause explosions, and contaminate water and that the tanks will develop leaks from the following causes:

a. Electrolysis,
b. Corrosion,
c. Vibration,
d. Temperature,
e. Floating out.

(Finding LXXXIII, R. 63.)

Unless these objections can be reduced to terms of public hazard, they have no place in this discussion.

Taking them up in their order, we invite the Court's attention to what the record shows and what the Master and the Trial Court found as to each of them:

a. Electrolysis.

This danger is absolutely eliminated by the Master's Finding No. LXXXIII-a, to the effect that conditions which produce electrolysis are not present in Blocks 40 and 71 in the City of Marysville.

b. Corrosion.

The danger from corrosion is practically eliminated by Finding No. LXXXIII-b, to the effect that, assuming that the entire acid content of the soil at petitioners property is sulphuric, the content is so low that it might take a term of years for corrosion to occur; that this danger is negligible is further shown by the testimony cited hereinafter under Assignment No. 26 (Respondents' Brief, P. 75) and that whatever danger there might be can be properly protected as shown by the testimony of Dr. Patrick (R. 368.)

c. Vibration.

Placing the greatest emphasis upon the possibility of danger the Master has found that it *might* weaken the tanks (Finding LXXXIII-c,) although this is further minimized from the testimony as set out in Assignment No. 27 (Respondents' Brief, P. 76) and negatived by the experience of the Fenwick Oil Company, hereinafter referred to.

d. Temperature.

The Court's attention is invited to Assignment No. 28, and the testimony in support thereof (Respondents' Brief, P. 77, and the Master's Finding No. LXXXIII-d) to the effect that temperature changes *might* weaken the seams but that there would be less temperature changes underground than above.

e. Floating Out.

This danger is absolutely eliminated by Finding No. LXXXIII-e (R. 64) to the effect that tanks buried three feet underground have not floated out during periods of very heavy rainfall and moreover danger of floating out can be overcome by proper drainage and anchoring down the tanks. (Finding LXXXIII-e.) (R. 64.)

That is to say, all causes are negatived except, vibration and temperature change and the only danger of leakage is that vibration *might*, and temperature changes *might* weaken the seams, although there is ample testimony to show that both of thees factors are more active above ground, as will be shown hereinafter.

Now then if we get some leaks where will it go to do harm? Let us again look to the court's findings. (Findings LXXXIII-f.) Tests of the soil showed that exerting a pressure of 14½ pounds per square inch for 2½ hours only a few small drops of water and no gasoline could be forced into it and that the soil is practically impervious to water or gasoline; and that there are no wells in the vicinity for the contents to get in and the tanks, if buried,

would be on a 2½ foot lower level than the sewers and therefore the contents are not likely to get into them.

Fortunately we need not hazard a guess as to any danger from complying with the Ordinance because the Fenwick Oil Company has three tanks buried underground and in compliance with the Ordinance in Block 71; two were there two years and one, one year at the time of the trial, each tank of a capacity of 11,750 gallons. (R. 219.) His experience is the only concrete bit of evidence in the entire record. These tanks have not floated out during heavy rains, (R. 220); they are located one block from the main line of the Union Pacific Railroad and have not been weakened by vibration, (R. 226-7) there have been no explosions or fires at them, (R. 227); when the third tank was buried the first two were examined and showed no signs of corrosion or decay from electrolysis. (R. 219-20.) There are less temperature changes underground than above and therefore less strain on the tanks (R. 221) and Fenwick has had no trouble with leaks (R. 221) and was able to measure out within seven gallons, on a week's business of 8000 gallons. (R. 220.)

The record is conclusive as stated by the Circuit Court of Appeals that

> "It is also apparent from the experience of the Fenwick Oil Company that the difficulties attending the installation, maintenance and operation of tanks underground are not insuperable." (R. 433.)

Now to measure over against the "strawman"—a remote possibility of a leak; and of it getting anywhere if

it got out—we have quite a number of factors which minimize the hazard underground. Among them are these:

1. There is less danger of explosion and fire in underground storage caused by lightning, an element which causes a great many fires in oil storage;
2. There is less danger underground from fire and explosion caused by static electricity;
3. There is less danger underground from fire communicated from the burning of other property;
4. The experience of those with a self-interest to protect evidences the greater safety in underground storage.

We will discuss these *en masse*. The Master has found that there is less danger of explosion and fire in underground storage caused by lightning, an element which causes a great many fires in oil storage (Finding No. LXXXIV, R. 65;) and also that there is less danger underground from fire and explosion due to static electricity (Finding XXXV, R. 65), such as caused the fires at Robinson and Greenleaf. It must be apparent that one of the great dangers in above ground storage is from the effects of fire communicated from the burning of other property, such as weeds and buildings. With under ground storage, this danger is nil. With above ground storage, it has generally been the fires at warehouses and tank wagons and other property which have created sufficient fire to heat up large tanks so as to cause them to split out the seams or the valves, thus allowing the gasoline to run a distance and burn and communicate fire to other property, or to have the heat so intense as to cause

an explosion. (Finding LXXXI, R. 62.) In Blocks 71 and 40, at Marysville, Kansas, however, safe and harmless the storage of gasoline may be (bear in mind that such stations in small towns do not have constant attendants and highly efficient fire departments and equipment), a fire at the large coal warehouse from spontaneous combustion or otherwise would immediately convert the tanks, however harmless they might be, into a positive hazard. Likewise, a fire at the Riepen house or outbuildings would make the same situation at the Sinclair property and it would, in our judgment, create a very dangerous and hazardous condition in the entire south half of Block 71.

That respondents were entitled to a specific finding to the effect that the danger in underground storage from communicated fire was less than in above ground storage is shown by Assignment No. 31, (Respondents' Brief, P. 81), and the Circuit Court apparently conceding the merit of that Assignment, said:

> "It is entirely conceivable that a buried tank is less likely to take fire and explode from any causes which otherwise threaten, and that, if an explosion should occur, the danger to surrounding property would, at least be minimized." (R. 434-5.)

It is significant that The National Board of Fire Underwriters has established a base insurance rate on underground storage at fifty (50) per cent of the base rate of above ground storage. The National Board of Fire Underwriters, and The Western Actuarial Bureau, and The National Fire Protective Association, are regarded as authorities in the field of risks and rates and are interested

in the preservation and elimination of fire hazards. To this end they maintain laboratories, inspection bureaus, rating bureaus, and test materials. It is to their interest to eliminate and reduce fire risks and to collect sufficient premium returns to carry the risk, and in the light of their experience, losses, and knowledge of fire hazards they make the underground storage rate fifty (50) per cent of the above ground rate, and as is shown in Assignment No. 37, The National Board of Fire Underwriters recommends underground storage to obtain the greatest measure of safety. As stated by Judge Van Valkenburg:

> "The judgment of risk companies, founded upon self interest and wide experience is very persuasive" (R. 433.)

And again referring back to the nature of the commodity and business, the location of the tanks and their surroundings, the recent and prospective growth and development in the City of Marysville and the Southwestern part thereof in the vicinity of Petitioners' tanks and that the elements which might cause leakages and consequent damage are all missing except the bare possibility of vibration and temperature changes, over against which the court has found that there is less danger from fire and explosion in underground storage, due to lightning or to static electricity, can the court say that there is not at least a fair difference of opinion as to the reasonableness of the Ordinance, and whether the City was actually protecting the lives and property of its citizens, or that the city, with the recent experience at Robinson and Hays near at hand,

has not in good faith attempted to correct an evil where experience had shown it to be most felt?

B. Assignments of error or erroneous findings of fact made by the master which were before the Circuit Court of Appeals and which strengthened the validity of the ordinance.

In order that this Court may know more fully what the Circuit Court of Appeals for the Eighth Circuit considered, we shall set out the Assignments of Error therein urged. Although the Circuit Court of Appeals makes no specific ruling on each of these Findings the opinion discloses that in the main they were sustained.

Assignments Nos. 7 and 10.

That the Court erred in Finding (No. IX, R. 37) that the Standard Oil Company erected its plant and tanks for storing gasoline and kerosene with the knowledge and consent of the City of Marysville, that its right or authority to erect or maintain them was never questioned until October 8, 1923, and that no complaint was ever made or fault found therewith, contrary to the record, as shown by the stipulation entered into by the parties to the effect that the city never granted a permit and that two years prior to the above date ineffectual efforts were made to regulate by ordinance the keeping and storing of gasoline and kerosene. (R. 287.)

This stipulation refutes the petitioners' statement at Page 48 of their brief to the effect that no complaint had ever been made or fault found with the petitioners' tanks.

Assignment No. 8.

The testimony of Wagner (R. 115) and Finding No. LXXII, (R. 59) show that the tanks of the Standard Oil Company were 11,000 gallon capacity instead of 17,000 gallon, as found by the Court. This is material because the 11,000 gallon tank is 16 feet in length, whereas the 17,000 gallon tank is 29 feet 6 inches in length, being much larger, and one of the main arguments of the Petitioners is that because of the large size of the tanks it is impracticable to bury them and being so large they will vibrate and spread at the seams.

Assignment No. 11.

The Court found that the tanks of The Standard Oil Company at Marysville, are of the kind and character generally employed by it at all other points than the City of Marysville. (F. XXI R. 42.) The only testimony in this connection is that of Messrs. Wagner and Lewis. (R. 115, 117-19, 410.) In fact, Wagner's shows that the Marysville tanks are considerably smaller than the ones the Standard uses. The only testimony of Lewis tending to support this finding is that the above ground storage is the commonly used type of storage. (R. 197.) No attempt was even made to show what the Court finds. Objection was made to this type of testimony because incompetent, irrelevant and immaterial, attempting to establish a custom not binding on the defendants, not within the issues in the cause, constituting no equity, which objection was overruled and exception noted. We

are unable to see the relevancy of what the plaintiffs do in other places, or what their equipment is in other places, determining whether or not the regulation by the City of Marysville under the circumstances and surroundings there has been reasonably exercised. The objection to this testimony should have been sustained.

Assignments Nos. 9, 12, 13 and 13-A.

The Findings excepted to make the following points:

1. That the venting devices on both the Standard and Sinclair tanks are sufficient to carry off any vapor arising from the liquid even when the same is subject to extreme heat. (F. XVI, R. 41.)

2. That the plaintiff's tanks are so operated, maintained and equipped as to be safe from the standpoint of public safety. (F. XXXI, R. 44.)

3. That the Standard Oil Company has had only 66 fires in five years at 12,000 *similar* tanks and of those only one exploded and only one spread fire to the injury of persons or property, that in each case being the tank at Hays, Kansas. (F. XXIII and XXIV, R. 42.)

4. That the tank at Hays was not *similar* to the tanks at Marysville, because it did not have the same type of manhole cover. (F. XXV, R. 43.)

5. That no tank *similar* in construction, equipment or manner of operation ever exploded or fire spread from it to the injury of property and the safety of others. (F. XXVI, R. 43.)

In considering these assignments, we urge the Court to examine Findings LXI, LXII, LXIV, LXIX, LXX,

LXXI, LXXXI, LXXXIII, LXXXIV, LXXXV, and LXXXVI. (R. 50-9, 62, 65.)

The finding that the venting devices are sufficient to carry off any vapor and safe from the standpoint of public safety is in direct conflict with finding No. LXXXI, (R. 62) wherein the Court finds as follows:

> "Gasoline and kerosene are of such a character that even when the most modern safety devices are in use a relaxing of conditions, a careless act or an accident, or failure in the operation of the safety devices, or in the presence of extreme heat, may result in fires or explosions most destructive to life and property."

Moreover such a conclusion is so contrary to the experiences of mankind as to be shocking. The findings and records show that the courts have taken judicial notice of the fact that gasoline and kerosene are highly explosive agents; that considering human fallibility; accidents occur in the operation of the most-perfect mechanisms; what may, under proper precautions, be for the time being a harmless agency, may unexpectedly be transformed into a most dangerous explosive which prostrates everything near it, and with such a class of things, the greatest care is but a slight assurance of safety.

State v. Cozad, 113 Kan. 200, 202; *Heeg v. Licht*, 80 N. Y. 579; *O'Hara v. Nelson* (N. J.), 63 Atl. 811; *Waters Pierce Oil Company v. Mayor, etc., of New Iberia*, 47 La. Ann., 43 S. 343; *Pierce Oil Company v. City of Hope*, 127 Ark. 38, 191 S. W. 405, 248 U. S. 497, Ann. Cas. 1918 E. 143; *Whittemore v. Baxter Laundry Company*, 148 N. W. 437 (Mich.).

At this point we again call attention to the admission in support of the foregoing made by the petitioners in their brief, as follows:

> " • • • City officials and individual citizens know generally that gasoline and kerosene at times emit explosive vapors and • • • are influenced by the general belief that underground storage thereof will lessen the danger incident thereto."

The Court finds that The Standard Oil Company has 12,000 similar tanks of which only one, that at Hays, has ever exploded or caused damage to person or property by fire. (Findings Nos. XXII, XXIII, XXIV, R. 42.) But the Hays tank, similar for that purpose, suddenly proves not to be similar in Finding No. XXI, (R. 43), because the manhole vent is different.

It is interesting to note that in a suit for damages brought against the Standard Oil Company for death arising from the explosion at Hays (*Buchholz v. Standard Oil Co.*, 211 Mo. App. 297; 244 S. W. 972, 978), the Standard Company, in attempting to show that it was not negligent introduced in evidence a safety valve, presumably for the purpose of showing that every modern precaution had been taken to guard against such an accident. This point is referred to in *Cities Service Oil Company v. City of Marysville*, 117 Kan. 514, 519.

Finding No. XXV, (R. 42) in specifying that the manhole vent is not similar, leaves out of consideration many other devices on the tanks. In these the Hays tank had the same equipment. Consequently this finding is not fair and complete.

To the petitioners contention that proof would not be competent unless it were as to identical tanks, identically equipped and operated under identical circumstances, reference will be made hereinafter under Specification of Error No. 3.

In findings Nos. LXXII and LXXIII, (R. 59) the Court does not state that the vent relieves pressure in all circumstances, but says they "*are intended to.*" We ask this Court to read Finding No. LXXXI, (R. 62) carefully and then bear in mind that the danger of fire increases in proportion to the quantity of gasoline (Cross, R. 377), and that if sufficient accumulates in any one point there will be danger of an explosion, and that five gallons of gasoline is extremely dangerous (Cross R. 129); that the vents are sufficient *if they operate properly* (Cross, R. 132, Brooks, R. 384-5-6-7, Boehmer, R. 140-1, Gamber, R. 178, 180); that if the vents become overloaded, the tank will rupture (explode) (Boehmer, R. 297); that *the Greenleaf tanks of The Standard Oil Company*, the fire at which is testified to and is shown by Plaintiffs' Exhibits I, J, K, L, M and N, *have exactly the same equipment as its tanks at Marysville; that this equipment operated perfectly but that another valve, the most important valve on the tank, failed to function* and that the fire burned from three o'clock P. M., all night, and was so hot that they could not get near it until about ten o'clock the next morning and an ordinary Kansas wind blew the flames so as to burn the prairie 100 feet away (Brooks, R. 377-8); and supposing that the valve had not melted off, what assurance is there that the "screech-

ing'' McDonald vent and manhole cover would have taken care of the pressure? That a flame as shown in defendants' Exhibit F, would set fire to a house 58 feet away or seriously endanger it. (Hopkins, R. 164, Campbell, R. 192.) At the Robinson fire box-cars were burned up 50 to 60 feet from the tanks (Hubbard, R. 230; Decker, R. 233, 236, 237); and that at the Greenleaf fire the flames shot 100 feet in the air and gasoline burned in a running flame 70 feet away; and set fire to other property at McCracken from 50 to 75 feet away. (Armstrong, R. 288-9; Frankenstein, R. 242-3; Keuffer, R. 246.)

And what supervision, rule or regulation of the petitioners is going to prevent another Interstate Refinery fire and explosion because the men who handled the still did not know what they had (Boehmer, R. 405), or disaster from the act of the careless fellow mentioned by Gamber, (R. 182), Campbell, (R. 189); or insure against the carelessness and human fallibility of such employees of the Standard Oil Company, as Quinley, who let the tanks run over (R. 239, 240), and Wehner, who failed to shut off the cut-off valve. (R. 257-8.)

The foregoing high points are taken in most every instance from witnesses produced by the Petitioners.

Now read carefully the testimony about actual fires and explosions at these storage stations and now read Finding No. LXXXI (R. 62) carefully again. Petitioners have laid all their emphasis on explosions and neither have nor can refute the fact that the commodities as stored are a fire hazard; the only thing that the patent Standard Company manhole vent does is to keep the flame

burning at the outside as it did at Greenleaf, shooting 100 feet into the air to be whipped by an ordinary Kansas wind to set fire to an immeasurable amount of combustible property in Blocks 40 and 71 at the City of Marysville, as shown in the photographic pictures as exhibits. The word "similar" has been loosely used. It is not fair to use it unless all the facts are in the record. *No effort has been made to show the surrounding circumstances and conditions at the 11,999 other similar tanks and we contend that it makes no difference;* that the measure of the reasonableness of the discretion exercised by the Mayor and Council of the City of Marysville is determined by the nature of the commodity and the local and surrounding circumstances at Marysville, and not by what these plaintiffs do or do not do or have or have not done at some other points.

The Standard Oil Company says: We have a new patent "do-dad" and there will be no explosions or fires in the future. Who knows!

Mr. Boehmer, an employee and expert of The Standard Oil Company, demonstrated how placid and harmless gasoline is by voluntarily producing a test tube and holding a match at the top thereof to show that the vapor burned off readily and that in the tank the same would happen at the manhole without any danger whatever. (R. 294.) He was asked whether, if a cork were placed at the top of the test tube with a hole in it bearing the same relation in size as the manhole does to the 10,000 gallon tank, whether that opening would relieve, when heat were applied. He stated that he thought it would relieve it

satisfactorily. It was interesting to note that when counsel held a match at the bottom of the test tube that the gasoline "lifted itself out of the tube" (R. 299), and boiled over in flame on the fingers and hands of the demonstrator. This shows the apparent danger when any fire occurs near a tank above ground, regardless of all of the patent safety devices and vents.

Assignment No. 24.

In passing, just a word about the Sinclair Refining Company and its equipment with particular reference to Exception XXI (R. 76) to Finding LIII (R. 48), on the point of maintaining its property in a careful, prudent and safe manner. The Court's attention is invited to the testimony of the witness Travelute (R. 202-3), and the defendant's Exhibits A and B, these being photographs of the Sinclair tanks, and the testimony of the witness Campbell (R. 189), that fires at oil distributing stations come from grass fires, sparks, matches, etc. In fact there isn't any evidence in the record at all upon which the Master could base a finding that the Sinclair Refining Company's tanks are equipped with sufficient venting devices. A lot was said about the Standard company's patent safety manhole cover, but *the Sinclair company does not use it and no witness would testify that their manhole venting device was sufficient to take care of all excess vapors under extreme heat.* And when that cover blows off, as it did from the Sinclair tanks at McCracken (Keuffer, R. 246, and Frankenstein, R. 242),

the whole works is ready to burn from an open manhole 18 inches to two feet in width.

Assignment No. 14.

The Court erred in finding that the burying of the tanks of the Petitioners is more dangerous to property and persons than the maintenance and operation of said tanks above ground. If these findings are correct and fair, that would end the lawsuit. The Court should have found, as requested, that the storage underground is less dangerous to property and persons, or if the finding as made was given, the Court should have found, as requested by Petitioners, that there is a substantial conflict and fair difference of opinion as to whether above ground or underground storage is the more hazardous to public safety and that all testimony to the effect that above-ground storage is less hazardous is based on general conditions and not on conditions existing in Blocks 40 and 71 in the City of Marysville; whereas, the testimony that underground storage is less hazardous is based both on general conditions and conditions in and around said Blocks 40 and 71 in the City of Marysville. We ask the Court to consider these findings in conjunction with findings Nos. LXI, LXII, LXIV, LXIX, LXX, LXXI, LXXXI, LXXXIII, LXXXIV, LXXXV, LXXXVI. (R. 50-65.)

As before the Circuit Court of Appeals, Petitioners now before this Court, lay great emphasis upon the expert judgment and training and experience of their witnesses. It is so easy to be misled by the high-sounding qualifica-

tions solely from the Petitioners' point of view and to overlook the actual qualifications and the materiality and weight of the testimony given by the same witnesses. Petitioners group them as high-class, independent chemists, men of experience in storing gasoline, men of experience in installing aboveground storage tanks, insurance engineers, state fire marshals and men of experience in selling petroleum products, and men in the employ of the Petitioners. (Petitioners' brief, pp. 56-64.)

We respectfully suggest to the Court that all of these witnesses, except Cross, Gamber, and Campbell, were employees of the Petitioners; that not one of them had any experience with underground storage. Campbell and Gamber and Tasker told about some leakages from underground storage, but an examination of the testimony as to each of them in the light of the facts of this case show them to be clearly inapplicable. Not one of these witnesses had any real knowledge about the conditions in Marysville, and when all of their testimony is taken at full weight and reduced to terms of public hazard the Court will observe that its effect is almost entirely negatived by the other testimony in the record and the Findings of the Master. Now just what would that testimony do?

Cross, a petroleum chemist, testifying generally, and without knowledge of the conditions at Marysville (R. 129), first testified:

> "Q. You may answer which is the safer?
> "A. From the standpoint of both the manufacturer and the public an underground tank it the safer for storing gasoline." (R. 123.)

Later, he changed his opinion to the effect that underground tank has more hazards than the above-ground tank. (R. 127.) It was pretended that this was a slip of the tongue, but it developed that in a copyrighted book put out over his name he recommended that:

> "Store gasoline in underground steel tanks * * * they prevent loss by fire, evaporation, and spilling." (R. 375.)

He stated, of course, that that only applied to smaller quantities, but reaffirmed his general opinion, stating:

> "That has always been by opinion if it is possible to have perfect construction then underground storage would be better." (R. 376.)

But stating that a large tank would develop leaks.

Dr. Cross also testified that a 10,000 gallon tank of gasoline in the middle of a residence district is hazardout, that gasoline will explode under the right conditions, and,

> "Unfortunately burns sometimes when you don't want it to" (R. 129);

that the nature of the soil would have something to do with the danger resulting from leaks and that if tanks were so situated that seepage could not get into water courses and sewers the objections to underground storage on account of leaks would be removed. (R. 127.)

Boehmer, an expert and employee of the Standard Oil Company, testified that underground storage presented a greater hazard because of leaks due to corrosion, electrolysis, vibration and floating out of the tanks (R.

138-9); that lightning is one of the hazards of the business, and that if any device does not relieve the tank will rupture (R. 138-9-40); that if the devices are not of the right kind they can be overloaded (R. 297); that soil conditions would have some bearing on the danger but that he did not know the soil conditions at Marysville. (R. 139.) It is well to note that during the course of the trial and after Dr. Cady's testimony on the soil conditions, Mr. Brooks went to Marysville and brought back thirteen samples of soil which he delivered to Mr. Boehmer, and the latter did not refute the testimony of Dr. Cady that there was no danger from corrosion as the properties of the plaintiffs. Mr. Boehmer apparently acquiesced in Dr. Cady's findings and conclusions. (R. 399.)

The other witnesses preferred above ground storage; Munroe because it was impracticable to bury large storage tanks and maintain them safely on account of possible leaks (R. 152-3); Hopkins "because you can keep the tanks in good condition" (R. 159); Griffin, director of sales of the Kansas City branch, testified as an expert, because "easier of supervision" (R. 167); Gamber, because you cannot detect leaks in underground storage, but knew nothing about conditions at Marysville (R. 175, 178); Campbell, "The fundamental reason that I say that is because of the fact that there are so few underground tanks in the territory" (R. 183); he first thought underground storage was safer, but when asked about arriving at the opposite conclusion, he said:

"I arrived at this conclusion when consulted by Mr. Evans, because never before had it been brought to my attention."

Lewis, assistant sales manager, "Because the tanks above-ground can be properly policed" (R. 198). None of these witnesses except Brooks, Wagner, and Munroe, had ever been in Marysville.

Now on the other hand, Messrs. Travelute, Bowman, Fenwick, Cady, Simpson, Henderson, Burgster and Patrick, consider underground storage the more safe.

Travelute, after describing the location and surrounding buildings and testifyng from experience common to mankind stated that he considered the present plants of the plaintiffs at Marysville a material hazard (R. 206); Bowman of the Division Engineering Department of the Union Pacific Railway Company testified that that great corporation stores gasoline in two 8,500 gallon tanks in his division, buried underground; one of them has been buried five years, and they have had no trouble from leaks and that the Fire Protection Engineer of the road has required that all gasoline storage at section toolhouses be buried (R. 328-9-30); Tarvin described soil conditions in Blocks 40 and 71 in the City of Marysville as gumbo and clay (R. 291), and produced Exhibit 9, a piece of oil line pipe which had been buried since 1913, at a point on the railroad right-of-way where fuel oil cars are unloaded and which was introduced as Exhibit 9; and also a piece of cast iron water pipe, defendants' Exhibit 10, which had been in the ground since 1889. These exhibits refute the much talked of

danger to underground tanks from corrosion and electrolysis.

Dr. Cady, an eminent chemist, whose qualifications and remarkable experience are set out in R. 301-2, and who discovered helium, a natural gas, both from his broad knowledge and experience and actual knowledge, and tests made of conditions at Marysville, Kansas, stated that:

> "Without any hesitation whatever I would say that above ground storage is much more hazardous." (R. 319.)

We have taken into consideration the comparative opportunities of policing tanks to discover leakage (R. 319), and considered specifically the questions of corrosion (R. 308-9-10), electrolysis (R. 302-3), vibration (R. 312), temperature changes (R. 311-12), and the danger of fire from external sources. (R. 319.)

Roy L. Simpson with extensive practical experience around oil fields, refineries, and gasoline plants, also considered underground storage much less hazardous (R. 335) because there was more danger above ground from static electricity (R. 335), fire from other sources (R. 335-6), from lightning (R. 339-40), and from explosive mixtures due to temperature changes. (R. 336-8.)

Alex. Henderson, Chief of the Fire Department, of Kansas City, Missouri, and a fire-fighter of fifty years' experience, speaking from that experience and not from an engineering viewpoint, testified that tanks above ground are the more dangerous. (R. 356.)

Burgster, of the Western Actuarial Bureau, who is

responsible for the fire rate schedules in twenty states, including Kansas, considered above-ground storage more hazardous than underground and that the tanks of each of the appellees at Marysville, would be less hazardous if underground; because there is less danger from fire being communicated to them, safer from lightning and from static electricity (R. 360-4); and

Patrick, Consulting Chemist operating industrial testing laboratories at Kansas City, whose qualifications and experience are set out at R. 367-8, stated that underground storage unquestionably represents safer storage than above ground, largely on account of less temperature changes and less danger of explosive mixtures and less danger from lightning. (R. 368-9.)

As to high class independent chemists, we match Dr. Cross with Professor Cady and Mr. Simpson. As against the men of long experience in storing gasoline, Mr. Boehmer and Mr. Hopkins, neither of whom had any experience in underground storage, we also match Professor Cady and Mr. Simpson, and the testimony and experience of Fenwick, the real concrete evidence in the case.

As against the men of experience in installation, such as Brooks and Monroe, we call particular attention to the fact that Brooks never expressed an opinion as to the relative hazard, and his unfair and warped viewpoint is shown by the quotation from his testimony cited in petitioners' brief, page 58. These men never knew anything about underground storage, and apparently do not want to learn anything about it.

As to insurance engineer, Mr. Campbell, we take pride in having his testimony compared with that of Mr. Burgster, who out of a wealth of experience had his opinion made up before this cause ever was tried and stuck to it.

And as to men experienced in fire hazard, such as the Fire Marshal of the State of Illinois, among whose qualifications was that he had been campaign manager for Governor Lowden, we clearly place the testimony of Alex Henderson, a practical firefighter of fifty years' experience, Chief of the Fire Department of Kansas City, Missouri.

As to the testimony of the men experienced in selling petroleum products, their viewpoint was born of convenience and service to their company. In fact they never should have been permitted to testify as experts on the relative hazard because they knew nothing about it.

And as to men not employed by the Petitioners, such as Mr. Tasker, we gladly call attention to the experience of Mr. Bowman with underground storage.

The witnesses for the Petitioners didn't know anything about the conditions at Marysville; the Respondents both knew and told what they were.

It is the Respondent's contention that there is a substantial conflict and fair difference of opinion as to whether storage above ground or underground is more hazardous to public safety and therefore requested the Master so to find, which request, No. 39, was refused. *A case such as this cannot be governed by the rule that if there is any evidence to support the Master's finding*

the Court will not overturn it, for it is the very essence of the exercise of the police power that opinions may be divided, but as long as on the hypothesis that the danger is real the action of the City Council may be upheld on any reasonable basis, the courts will not interfere with the exercise of that power (*Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 54 L. ed. 515, 516.)

As courts do not void ordinances as unreasonable where there is room for a fair difference of opinion (*Hartman v. City of Chicago*, 282 Ill. 511; 118 N. E. 731) the Respondents were entitled to a finding from the testimony that there is a substantial conflict or fair difference of opinion as to whether storage above or below ground is more hazardous.

Assignment No. 37.

The Respondents offered testimony to show that the regulations of The National Board of Fire Underwriters for the storage of petroleum, provided that,

> "Outside underground storage is the safest storage possible, and inside the building storage the most hazardous."

and,

> "That storage tanks should be placed underground to obtain the greatest measure of safety." R. 372.)

These regulations are also approved by The National Fire Protective Association, and are found in full in the book of exhibits.

These regulations are discussed by the Witness, Cross,

(R. 176-8); Gamber, (R. 127-8) and Campbell, (R. 190), 372-3.)

The witness, Gamber, had testified that The National Board of Fire Underwriters did not recommend underground storage as safer than above ground (R. 176) and the witness Campbell had stated that if there was such a thing it was merely their opinion and did not constitute a regulation. (R. 190.) The regulations, in printed form were offered as a part of the cross-examination of the witness Campbell because of this contrary testimony.

Assignment No. 15.

The Court found (F. XXIX, XXX, LXIII) that the tanks of the Standard Oil Company are located in a sparsely populated portion of the City of Marysville and that there are no changed conditions in the buildings or improvements around the tanks and premises of either of the Petitioners or in that vicinity which justified a passage of Ordinance No. 350. The error in these findings is apparent from Respondents' Exhibits D, E, H and I, and Findings LXI, LXIX, LXX, LXXI. Reference to the comparative analysis set out at pages 21 to 31, of this brief, and R. 50-59, will show manifest error.

Assignment No. 16.

The Court erred in admitting over the objection of the Respondents and in findig that the tanks in question do not present a greater fire hazard than would a frame building or a stock of groceries in a frame building at

the same location for the reason that these facts constitute no equity and raise imaginary questions not within the issues. (See Br. —.) The Court should have found, as requested, that the City Council may make reasonable classifications of private property and business for the purpose of regulating them in the interest of public safety and a classification putting frame buildings and frame business structures in one class, and a storage of gasoline and kerosene in another is a proper classification and the evidence does not show and there is no presumption that proper regulations have not been made of frame buildings in the interest of public safety. (R. 218.)

Assignment No. 17.

It is apparently misleading to state, as the Court found, that the dwelling house close to the Standard Oil Company tanks is *more* than 98 feet, in view of the fact that there are other dwellings and many combustible buildings within lesser distances, as shown by the comparative analysis hereinabove. (Br. 34.)

Assignments Nos. 18 and 19.

So much stress has been laid on the fact that cinders give rise to a sulphuric acid which corrodes metal that the Finding that large quantities of cinders have been and now are used for ballast upon the tracks of the Union Pacific Railroad Company is not clear, accurate, and complete. The testimony of the witnesses Brooks (R. 134), and Bowman (R. 278), shows that it is cinder and

Sherman Hill gravel. In fact the witness Bowman, testified:

> "That there is no cinder ballast on the spur track in Block 71"

east of the Sinclair tanks the ties being filled in with black dirt. Respondents' request that the ballast is of cinder and Sherman hill gravel and that pipes buried on this right-of-way for at least eleven years showing that there was little corrosion, should have been sustained on the testimony of Tarvin (R. 292), and Defandants' Exhibit 9.

Assignment No. 20.

We consider this Finding purely surplusage as not within the issues as shown by Finding No. LXXIX for if neither of the Petitioners store, or anyone else have ever stored, crude oil in the City of Marysville, there is nothing in that regard about which the Petitioners can be heard to complain.

However, we just want to call attention to the Court's Finding that crude oil is more dangerous than gasoline or kerosene in the light of the testimony on that point (R. 45) Cross, the leading expert, did not go as far as the Court, but placed crude oil and gasoline on a par. (R. 128.)

Bochmer was the only witness who said crude oil was more hazardous (R. 139) whereas Respondents' witnesses refused to make such bald statements that crude oil was more hazardous or as hazardous without knowing what

the gasoline content was of the crude oil in question. (Cady, R. 317-18, 325, 334.) The fairness of which must appeal to anyone who knows that gasoline is a distilled product from crude oil.

Assignment No. 22.

The Court erred in sustaining Respondents' 18th exception and not admitting evidence to show the number of automobiles and their kind and character owned and the number of garages operated and the capacity of auto-tanks in the City of Marysville, and in finding that it was unlawful for any citizen of Marysville to keep more than five gallons of gasoline in the tank of his automobile and that every garage keeper in Marysville who stores automobiles, the tanks of which contain gasoline is guilty of an offense under the ordinance. In the first place, this constitutes no equity on behalf of the Petitioners as is shown by Findings LXXVII and LXXVIII to the effect that neither of them operates automobiles for any other purpose than transportation of petroleum products, nor does it operate or maintain garages and the ordinance in question does not pretend to regulate the transportation or use but only the keeping and storing of gasoline and kerosene. (See Br. 22.)

Assignment No. 23.

The Court erred in not sustaining Respondents' 19th exception as set out in this assignment and in refusing to grant the Respondent's request that Ordinance No. 350 makes a reasonable classification as between gasoline and

kerosene on the one hand, and fuel oil and distillate on the other; and a reasonable classification as between the keeping and storing of 500 gallons or less of gasoline or kerosene on the one hand and quantities in excess of ten gallons on the other hand; and a reasonable classification as between the keeping and storing of 500 gallons of fuel oil and distillate on the one hand and quantities in excess of 500 gallons of said products on the other, and that said Ordinance applies equally to all persons, firms, or corporations who keep and store like amounts of gasoline and kerosene in the one case, and like amounts of distillate and fuel oil in the other, and is not discriminatory and does not deny plaintiffs the equal protection of the law. The reasons therefor are set out in the brief (p. 17).

Assignment No. 25.

The Court erred in refusing to find, as requested, that

> "Citizens of Marysville have assigned as a reason for not building in the vicinity of Block 71, their fear of the danger of the explosion of the oil tanks. (R. 205, Travelute.)

Assignment No. 26.

Although the Court found (F. LXXXIII-A and B), the general results of Dr. Cady's tests as to the possibilities of corrosion at Marysville, and found that it might:

> "Take a term of years for corrosion to occur,"

he refused to find, as requested:

> "That it is very doubtful that said acid found in Blocks 40 and 71 is sulphuric acid,

and,

> "That it would take a term of years for corrosion to start." (R. 309.)

and,

> "I think there would be no difficulty in protecting the tanks from soil acids. (R. 310.)

and,

> "I think the danger is not great from corrosion. It could be easily guarded against. (R. 310.)

Dr. Cady is the only person who examined the soil conditions and made tests and testified with reference thereto. His testimony is all there is in the record on the subject and the above request is exactly what he testified to. (R. 309-10.)

Assignment No. 27.

The Court found that:

> "In the conditions under and around Blocks 40 and 71, in the City of Marysville, there would be vibration—which *might* weaken the seams in tanks buried underground,"

and refused to find, as requested by the defendants,

> "That it is very doubtful whether under the conditions existing under and around Blocks 40 and 71, that there would be vibrations sufficient to weaken

> the seams in tanks buried underground and any leakages from such causes is a remote possibility."

There is some general testimony on the part of Petitioners witnesses without knowledge of or considering the conditions in Marysville, that vibration would weaken the seams. Fenwick has not experienced any with buried tanks. (R. 226-7.) Dr. Cady, who went over the matter very carefully, states that there would be greater strain from vibration on above ground tanks than those below. (R. 312-13.)

Assignment No. 28.

The Court found (F. LXXXIII-D) that the seams of a tank *might* be weakened by temperature changes to such an extent as to cause the tank to leak. This left out of consideration a great part of the testimony of witnesses for both parties which in our judgment supported the Respondent's request that the

> "Probability that the seams of a tank underground would be weakened by temperature to such an extent as to cause leaks, is very remote."

Messrs. Boehmer and Hopkins pictured an underground tank as buckling up and splitting open a foot or two at the seams due to temperature changes underground, but Fenwick has not experienced any leakages from that source in his underground tanks. (R. 220, 222.)

Dr. Cady stated positively that he could calculate the change which the iron would make due to temperature changes (R. 324) and that the seams would be more

likely to open above ground than below ground, and that they seem to contain it pretty well above ground. (R. 311-312.)

Simpson testified to the same effect (R. 336-7) and even Boehmer, although contending that the contraction *might* crack the tank, stated that the temperature underground would not vary much after arriving at the ground temperature. (R. 143.)

Assignment No. 29.

The Court was requested to find in connection with the seepage of water and gasoline through the soil in Blocks 71 and 40,

> "That it was quite improbable that any leaks so small as not to be discovered would seep through that soil in a lateral direction, but rather would come up through the loose soil in which the tanks were buried and dissipate in the air, and that owing to the facts that the tanks are lower than sewer level and the nature and construction of sewer, the possibility of any gasoline getting into them is too remote to promote any serious danger."

The testimony of Dr. Cady, Messrs. Brooks and Bowman bears out this requested finding. All the testimony of the other witnesses as to seepage at other places is under entirely different conditions not present at Marysville, being through filled, sandy, gravelly soils, river bottoms, etc. To cap it all the leading expert, Mr. Cross, said that the liquid would run at the rate of 300 gallons an hour through any kind of soil and through a soil which when exposed to a pressure of 14 pounds per

square inch for two and a half hours steady would only permit a few small droplets of water to pass through it.

This is a good example of extravagant expert opinion when an expert witness allows his exaggeration to get the better of his judgment in the interest of a biased cause.

On this point, after stating carefully his tests (R. 306-8), Dr. Cady testified:

> "My opinion would be that the gasoline would not travel in any appreciable quantity as far as the sewer. My test shows that the soil is pretty impervious to gasoline and then the tendency would be to carry the gasoline up toward the surface long before it traveled that far—then your sewer itself is pretty impervious." (R. 316.)

Likewise, Brooks, Petitioners' witness told about how gasoline would pocket in yellow clay and remain there showing imperviousness of the soil (R. 137), and Dr. Cross, although knowing nothing of local conditions, stated that if it would be impossible for seepages to get through the soil, the question as to seepage would be removed. (R. 127-8.) All of the testimony of other witnesses as to seepage at other places is under entirely different conditions not present at Marysville, being through filled, gravelly, sandy soils, river bottoms, etc. For example: Boehmer testified of gasoline coming out of the ground 300 feet from where it was stored, but this was in a creek bed (R. 142); Brooks told of the Missouri River getting in and floating tanks out of a pit or room at Atchison (R. 166); Griffin told about an incident at DeKalb, Illinois, where gasoline ran along the water

line and appeared in the kitchen sink, the odor of which the lady of the house discovered apparently coming out of the drain in the sink. (How it followed the water pipe and then came out of the sink drain has never been explained.) Gamber told about an underground tank at Fairfield, Illinois, springing a leak and the fumes getting into a sewer (R. 174), but these tanks were on a hill 75 feet above town, from which gasoline was taken by gravity down to the filling station in town; the tank did not develop a leak, but the fittings did; Gamber also told of finding gasoline in a well at Galesburg, Illinois, 250 to 300 feet away from the tank itself (R. 174-5), but it developed that the tank was buried in black loam (R. 179). He also testified about a tank at a brick plant leaking and the oil appearing at some distance away and it developed that this was at Brickton, Illinois, and the tank was buried in what had formerly been a swamp filled in (R. 179); and the witness, Tasker, told of seepage from an underground storage tank at Norton and also at Herington (R. 283) and it developed that the storage at Herington was a basin with six or eight inches of brick and four inches of concrete which cracked and at Norton the storage was set in fine sand below which was gravel mixed with water. (R. 285-6.) Particular attention is called to the overanxiety of one of the appellee's main witnesses, Dr. Roy Cross, who in his zeal stated that it would be possible for gasoline to pass at the rate of 300 gallons an hour through a soil which under test exerting a vacuum equal to 20 inches of mercury for 2½ hours, that is, a pressure of 14 lbs.

for 2½ hours only a couple droplets of water went through. (R. 380.)

Assignment No. 30.

The Respondents requested the Court to find that storage of gasoline in quantities of 10,000 gallons in a tank in a residential district is very hazardous which was refused. The witness, Cross, testified:

> "A 10,000 gallon tank set out in the middle of a residence district is hazardous * * * gasoline will explode under the right conditions. Gasoline sometimes burns when you don't want it to." (R. 129.)

Assignment No. 31.

The Respondents requested the Court to find:

> "That a large percentage of fires at storage stations originate in or about warehouses is caused by backfires of the motors in the tank wagons, sparks from gasoline pumping engines, and other causes, and that the danger from fires and explosions at storage tanks due to fire being communicated to them from tank wagons, warehouse engines, and other combustible matter is almost entirely eliminated when the tanks are buried underground because of the protection of the covering of three feet of earth."

The testimony as to the causes of the fires shown in the record at Robinson, Greenleaf, McCracken and Hays (R. 229, 239-40, 242, 248.) and Finding No. LXXXI (R. 62) substantiate the first part of this request.

That such fires create extreme heat around the storage tanks, as the heat increases the amount of vapor

increases, and with that the pressure becomes greater and as the pressure becomes greater, there is more danger of an explosion and that this danger from communicated fire, that is, fire communicated to a tank of gasoline from other burning material or property is almost entirely eliminated when a tank is buried underground, is the unanimous testimony of all the witnesses speaking of the subject on either side of the case. Dr. Cady made the apt comparison of how the explosive mixture propels an automobile and the same expansion and disruptive effect is more likely to happen in a tank above ground than one underground. (R. 285.) Hopkins, (R. 164); Campbell, (R. 192); Tasker, (R. 285); Cady, R. 319-21); Simpson (R. 334); Burgster, (R. 360); Cross, (R. 375-6.)

Moreover it is a matter of common sense, that anybody knows that there is a great deal more danger of a fire igniting a tank or its vapor above ground than three feet underground.

Assignment No. 32.

The Court refused to find, as requested by the Respondents below, that:

> "There is more danger of having an explosive mixture in tanks above ground than in those underground."

For the reason that the record shows that temperature changes give rise to explosive mixtures and temperature changes are more extreme in above ground storage than underground storage.

The testimony of both parties shows that because of the greater temperature changes above ground as compared with those underground there is more contraction and expansion because of the liquid and the metal in the tanks and, therefore, more "sucking in" of air from the outside into the tank; that the air being lighter than the gasoline vapors tend to lay between the liquid and the top of the tank creating at some point an explosive mixture. The testimony of the witnesses Boehmer, (R. 297-8); Cady, (R. 311-12); Simpson, (R. 337-8); Patrick (R. 368-9, and Cross, R. 129-30); shows that this finding should have been made.

Assignment No. 33.

Respondents requested the Court to find that there is less danger to the public safety from an explosion of a storage tank buried three feet underground than from a similar tank above ground. This request was refused. The only witness who testified on this point was Chief Henderson, and reference to his testimony at R. 356-7, the gist of which is that in an explosion above ground it blows all over the place, whereas if the tank is underground it can only tear loose at its weakest spot which is on the top and there is an opportunity to surround it with streams, chemicals, etc., in such an event.

Assignment No. 38.

The Court sustained the Petitioners exception to that part of Finding No. 81, as follows:

"The record shows fires at five storage stations in Kansas; two in 1919, two in 1920, and one in December, 1923. The McCracken and Greenleaf fires were at tanks of the Sinclair Company, equipped with McDonald Duplex Vents and loose manhole covers, the same or similar to those of the Company at Marysville, and at McCracken the top of the vertical gasoline tank was blown out and the kerosene tank exploded and was lifted off the foundation and thrown to the ground fifteen feet therefrom."

The Court erred in striking out this part of the Finding for he should have modified it to accord with the facts proved. As the only error was in stating that the McCracken and Greenleaf fires were at the tanks of the Sinclair Company whereas, in fact, the McCracken fire was at the tanks of the Sinclair Company and the K. T. Oil Company and that the Greenleaf fire was at the tanks of the Standard Oil Company. With reference to the McCracken fire, the testimony of Frankenstein describes the equipment, the manholes and the McDonald Vents and states that they are standard equipment used by the Sinclair Company (R. 1-2-3); that the roof of the K. T. gasoline tank blew off and the K. T. gasoline tank was lifted off its foundation into the road. (R. 243.) And Keuffer testified that the manhole covers on the Sinclair tanks blew off and as to the K. T. tanks substantiated the testimony of Frankenstein (R. 246), and that the K. T. tanks had 16-inch manhole covers. (R. 247.) That the fire at Greenleaf was at the Standard Oil Company's tanks and that the same were equipped with the McDonald Safety Vent and the Standard Oil Company's

patented manhole safety vent cover is shown by testimony of Quinley, (R. 240) and Brooks, (R. 385-7.)

Other Assignments.

All the other assignments of error go to the main question; that is, the finding and ruling of the Court that the equity is in favor of the Petitioners and against the Respondents and that the Ordinance in question is arbitrary, capricious, discriminatory, unreasonable, and subversive, and the Court's failure to find that said Ordinance constituted a reasonable exercise of the police power in the interest of public safety.

C. The Authorities Sustain the Validity of the Ordinance.

Bearing in mind now the Findings as made by the Court and the erroneous Findings and refusals to find just reviewed there cannot be the slightest doubt but that the means adopted by the City Council in this Ordinance bear a substantial relation to the end sought to be attained, that is, the public safety. In fact, the only objection urged is that it is impractical to bury tanks underground because of leaks which would develop from electrolysis, floating out, vibrations, and temperature changes. The first two absolutely are eliminated by the Court's findings and the Findings and the Record show that there is but a remote possibility due to leaks, vibrations, and temperature changes and none from corrosion. Over against this the underground storage is safer from the hazards of lightning, static electricity, and fire from ex-

ternal sources which from the record seem to cause practically all of the fires and explosions in such storage.

It may be that this Court feels that the Ordinance in question may not provide the best regulation that might be devised or that some other regulation might be equally as effective or more economical but that is a matter for the Legislative branch of the government and the Court will not substitute its views for the discretion of the council. Two sharply conflicting theories for the storage of oil are presented by the testimony, one being that underground storage is less hazardous to life and property than storage above ground, and the other being that storage above ground it just as safe. The former view having been taken by the Legislative body, the question is how far may a court go, and just what may it review in connection with its decision? We understand the law to be that the Court is not called upon to decide whether the Council exercised its discretion wisely or well, whether they arrived at a proper conclusion or not but rather, whether in arriving at their conclusion, they acted in bad faith and deprived the plaintiffs of their Constitutional rights. This view is sanctioned in *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, wherein Mr. Justice Holmes, speaking for the Court, concerning ordinance prohibiting cemeteries within the city, used the following language:

> "If every member of this bench clearly agreed that burying grounds were centers of safety and thought the Board of Supervisors and the Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be con-

sidered. Opinions still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we would not overthrow it merely because of adherence to the other belief."

Such cases as *Yick Wo v. Hopkins*, 118 U. S. 346, have very little in common with the case at bar. There, an ordinance of the City of San Francisco provided that it should be unlawful for any person to engage in the laundry business within the corporate limits without having first obtained the consent of the Board of Supervisors, except the same be located in a building constructed either of brick or stone, and it was held void because it did not prescribe a uniform rule of conduct but conferred a naked arbitrary power upon the Board to give or withhold the consent. In that case the court also found that the ordinance on its face purported to apply to all persons alike, both white and Chinese, but was so administered as to apply only to Chinese, thus presenting the element of bad faith, and unfair administration which is entirely absent from our own case. The Respondents requested (Request No. 40) a finding that the Mayor and Council of Marysville acted in good faith in passing an Ordinance which the Court refused to give although it was conceded by counsel for plaintiffs upon argument that they made no claim that the City of Marysville acted in bad faith in passing the Ordinance. There is no evidence even tending to show anything but good faith and an earnest desire to protect the public and the Respondents were clearly entitled to the finding requested.

A phrase from the case of *Dobbins v. Los Angeles*,

195 U. S. 223, "changed conditions" has been grasped by the Petitioners (Findings XXX and LXIII), the argument presented being an offspring of the vested right theory. In August, 1901, the City Council of Los Angeles adopted an ordinance making it unlawful to erect and maintain gas works outside a certain district described in the ordinance. In September, 1901, Dobbins commenced the erection of a gas works in the district privileged by the ordinance. When the work was nearly completed and in November, 1901, the Council passed a second ordinance amending the first by including in the prohibited district the territory in which the Dobbins gas works was located. The court found that there were no changed conditions and that nothing had occurred within the two months intervening between the passage of the two ordinances to justify the second ordinance, and stated that the action of the Council was strongly corroborative of the allegation that the purpose was not police regulation in the interest of the public, but the destruction of Petitioners rights and the building up of another gas company. In other words, that case turns upon the question of bad faith which is utterly lacking in this case. The Dobbins case is one of those cited by the Court in support of his conclusion. If it is said that the Dobbins case establishes a rule that there must be changed conditions to justify a police regulation, the Court's Findings LXIX, LXX, LXXI, bring the case within such a rule.

A very dissimilar situation from the Dobbins case is presented. There the Council in bad faith for the pur-

pose of benefitting some person by excluding all others from a similar business, deprived Dobbins of the right to use his property. In the case at bar the Council, after sudden growth which more than doubled the population of the City, adopted a regulation which they felt would better safeguard the lives and property of the people, with the knowledge of the Hays catastrophe fresh in its mind, which would prevent a recurrence of such a tragic thing. Surely there is little analogy between our own case and the Dobbins case.

Certainly, if this ordinance had been passed by the City of Hays, Kansas, after that most horrifying experience at the supply station of the Standard Oil Company, as set out in the case of *Buchholz v. Standard Oil Company*, (Mo.) 244 S. W. 973, would anyone dare say that there was even a fair difference of opinion as to the possible danger to life and property from such an agency? Or that such an ordinance constituted an unreasonable exercise of the police power? And that tank *was equipped with the modern safety vents*, and yet one end of it blew out and traveled 200 feet, burning up an elevator and the main body acting like a torpedo, went the other direction "tearing down telephone poles, iron posts, small trees, and landed 500 feet away from its foundation, killing 11 people, injuring 26, and burning several houses and causing large property damage." (*Buchholz v. Standard Oil Co., supra.*)

In this state of the record attention is invited to *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, where the Court said that the State Legislature was

entitled to choose between the theory of those of the medical profession who think vaccination worthless and believe its effect injurious, and the opposite theory, which is in accord with common belief, stating that:

> "It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or jury to determine which one of the two modes was likely to be the most effective for the protection of the public against disease."

The question of the validity of Ordinances regulating oil storage has been before our courts many different times, and it is significant that in no case the courts have deemed the regulation unreasonable.

In Morgan v. Board of Commissioners of the Borough of Collingswood, in the Supreme Court of New Jersey, 139 Atl. 718, a case involving a permit to erect a gasoline station and where the Board of Commissioners had found that there were thirty-nine (39) dwellings within five hundred (500) feet of the proposed site and that the ordinance provided that no such plant should be erected within five hundred (500) feet of any dwelling house the Court held that this was a reasonable regulation, saying:

> "• • • the courts recognize the hazard connected with the storage and sale of gasoline at service stations and further recognize the right of the governing body of each municipality to reasonably regulate this class of construction and business and to prohibit it where necessary."

Also quoting from Independent Pennsylvania Oil Company v. Gloucester, 134 Atl. Rep. 554, the Court said:

> "'To the broad claim here made that it (the ordinance) is not regulatory but prohibitory, and therefore beyond the power conferred by the statute (Home Rule act), we cannot agree. If it provided that no gasoline, etc., should at any time or under any circumstances be stored in the city limits, that would no doubt be prohibitory, but this ordinance is far from saying that. We consider it regulatory, though, of course, very strict in regulation.' and after referring to the character of the plant there proposed, and to the surrounding conditions, he added: 'We profess ourselves altogether unconvinced that even the one thousand-foot restriction as applied to the business of this prosecutor is an unreasonable one.'"

In City of Shreveport v. T. F. Nelson, in the Supreme Court of Louisiana, 115 So. 469, the Court had before it an ordinance making it unlawful to distribute gasoline, etc., from any tank wagon carrying in excess of five gallons, whether in one or more containers, except through metal lined hose extending from the container on such vehicle into the filler pipe of the underground tanks. A few expressions from the opinion of the Court are of interest:

> "* * * For the highly inflammatory character of gasoline itself, and of the vapors arising therefrom when unconfined, render it peculiarly susceptible to ignite from any neighboring fire; and once ignited the fire spreads with alarming rapidity.
>
> Not it is manifest that a fire in close proximity to even a small quantity of gasoline is dangerous

enough; but small dangers must be incurred if we would enjoy the benefits of modern progress. Globe & Rutgers Fire Ins. Co. v. Standard Oil Co., 158 La. 763 (IV). But a fire in close proximity to a large volume of gasoline has in it all the elements of an appalling catastrophe. In other words, flowing gasoline catches fire easily which is generally communicated at once to the container from which the gasoline is flowing; and the capacity of that container marks the difference between a small fire and a great disaster. The purpose of the ordinance in forbidding the delivery of flowing gasoline from a tank containing more than five gallons, is simply to guard against the alarming consequences of fire communicating to a large volume of gasoline on the streets of the city; and in our opinion the ordinance *does* add to the public safety and *does* tend to greatly diminsh the fire hazard in said city, to say nothing of the obvious danger of violent explosions.

"It is not open to question that the city might forbid the storage of large quantities of gasoline otherwise than in underground tanks. And if it may do so directly, it may also do so indirectly. Hence it is no objection to the validity of an ordinance intended to accomplish something even more highly important, that the indirect consequence thereof is effectually to suppress the use of above-ground containers for the storage of large quantities of gasoline."

The leading case is *Pierce v. Hope, supra*, and same case 191 S. W. 405, Ann. Cas. 1918E, 143. Another is the case of *Gulf Ref. Co. v. Keenan*. Other cases are, *Rex v. McGregor*, 4 Ontario L. R. 198; *Des Moines v. Oil Co.*, 184 N. W. 823; *Waters Pierce Oil Company v. New Iberia*, 17 So. 343.

We think the case of the *Pierce Oil Corporation v. City*

of Hope, 127 Ark. 38; 191 S. W. 405; Ann. Cases 1918 E 143, affirmed in 248 U. S. 498, 63 L. ed. 381, answers every objection to this ordinance.

This is a suit in equity brought by the Pierce Oil Corporation to enjoin the enforcement of an ordinance in the City of Hope on the ground that it constitutes a wrongful exercise of the police powers of the municipality. A general demurrer to the complaint was sustained and the appeal questions the sufficiency of the complaint and demurrer.

The complaint alleged that the corporation was engaged in the business of selling gasoline and oil, had for a great many years owned and used storage tanks in Hope; that the tanks were moved once at the request of town authorities and their location fixed to meet the wishes of the city officials and the town generally; that the tanks are so constructed with dome vents for escape of gas that an explosion is impossible; that in case of fire:

> "The only combustion would be the gas which escaped from them, and such fire would not be sufficient to spread to any buildings that are now in the neighborhood of or adjacent to the tanks; that the presence of tanks in no way endangers any other buildings or structures in Hope; that in transferring products from tank cars, said products pass through valves and pipes and are never exposed; that said tanks are a necessary adjunct to the conduct of appellant's business in selling petroleum products in Hope and vicinity; that appellant knows of no available location within the city at which tanks could be erected and oil stored without violating the terms of the ordinances and if enforced appellant would be

compelled to move its tanks at a cost of $800.00 and suffer a severe loss in daily sale as well as lose a most valuable lease."

It was also alleged that the ordinance violated the Constitution of the State and the Fourteenth Amendment to the Federal Constitution and that its enforcemen would deprive the appellant of its property without due process of law.

The ordinance prohibited keeping of gasoline or any of the other products of petroleum or any other inflammable or explosive oil, gas, or substance within 300 feet of any dwelling house, store room, or other light structure within the corporate limits of the city in a quantity greater than 60 gallons at one time; provided, however, that underground tanks would be permitted to carry not to exceed 600 gallons at one time.

The court said:

"This is a complaint brought by the plaintiff in error to enjoin the City of Hope from enforcing an ordinance that forbids the storing of petroleum, gasoline, etc., within 300 feet of any dwelling, beyond certain small quantities specified. A demurrer to the complaint was sustained by the supreme court of the state * * *. The plaintiff is engaged in the business of selling petroleum oil and gasoline, and has tanks on the right of way of a railroad in the city, which it moved to that place at the city's request. The mode of construction is set forth, and it is alleged that an explosion is impossible, and that the presence of the tanks in no way endangers any buildings. The tanks are necessary for the business; the present position diminishes the cost of transferring oil from cars, and cannot be changed without considerable expense and a reduction of the plaintiff's

lawful profits. The plaintiff adds that it knows of no available place in the city where the tanks could be put and oil stored without violating the ordinance; that the ordinance is unnecessary and unreasonable, and that the enforcement of it will deprive the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

"A long answer is not necessary. A state may prohibit the sale of dangerous oils, even when manufactured under a patent from the United States, * * * and it may make a place where they are kept or sold a criminal nuisance, notwithstanding the Fourteenth Amendment * * *. The power 'is a continuing one, and a business lawful today may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good' * * * .

"Then as to the allegation that plaintiff's plant is safe and does not threaten the damages that led to the ordinance being passed, there are limits to the extent to which such an allegation can be accepted, even on demurrer; * * *. As was well observed by the court below; 'We may take judicial notice that disastrous explosions have occurred for which no satisfactory explanations have ever been offered. The unexpected happens'." *(Pierce Oil Corp. v. City of Hope*, 248 U. S. 498, 499, 500.)

And the more recent case of *Klever Shampay Karpet Kleaners v. City of Chicago et al.*, 323 Ill. 368, 49 A. L. R. 103, an ordinance regulating dry cleaning establishments was sustained and held that the extent to which the public safety authorized the regulation of the construction of buildings and the conduct of business to be regulated,

and the method of regulation, would all be upheld unless manifestly unreasonable:

> "It is clearly within the police power of the city to provide an ordinance for the regulation and prevention of the storage of coal oil, naphtha, benzine, petroleum, or any of the products thereof, and other combustible or explosive material, *Standard Oil Co. v. Danville*, 199 Ill. 50, 64 N. E. 1110. Such regulation may properly include the provision of methods of installation and use of tanks for the handling and storage of volatile inflammable liquids therein, pumps, or devices for the removal and conveyance of the contents of such tanks, and where, in a building in which such liquids are stored, a business is conducted in connection with which such liquids are used, the regulation may include provision for the lighting and ventilation of the building, the manner of construction, and may require the persons in charge of such volatile inflammable liquids, and of the handling and using thereof, and of the room in which, and the equipment with which they are used, to be competent persons, and may provide for the examination of such persons and the inspection of the places, instrumentalities, methods, and means of storing and using such volatile inflammable liquids. The ordinance in question contained provisions of this character." (Page 109.)

IV. The case of The Cities Service Co. vs. the City of Marysville, 117 Kan. 514.

In discussing the case of The Cities Service Company vs. The City of Marysville, 117 Kan. 514, Petitioners make several incomplete statements in their brief which are calculated to give this Court the impression that the Supreme Court of Kansas has held that this Ordinance

is invalid on the grounds of unconstitutionality and unreasonableness (Petitioner's Brief, pp. 12-22.) If Petitioners had given the complete quotation it will be observed that the Court was discussing the grounds upon which the Ordinance might be attacked, considering the power which the city had under the law to enact such an Ordinance, and was not at the time discussing the unreasonableness of the Ordinance. A reference to the complete paragraph from which Petitioners have taken their quotations will make this clear. It is found in the dissenting opinion of Judge Phillips. (R. 436-7.)

It is stated that the Circuit Court of Appeals assumed that this case largely disposed of the case at bar and Petitioners make particular reference to the fact that the unreasonableness of the Ordinance must be determined by the facts of this particular case. With this we have heartily agreed since the inception of the litigation. And that the Circuit Court of Appeals has made reference to The Cities Service Oil Company vs. The City of Marysville (supra) case solely for the purpose of establishing the power to pass such a regulatory measure and did consider the case at bar on its particular facts is quite apparent from an examination of the opinion.

However, we shall quote a few extracts from that opinion going to the merits of that case:

> "A requirement that tanks used for that purpose shall be placed underground plainly has substantial relation to the end sought, and is not to be held unavailable merely because a court may think some other plan more economical or effective." (L. C. 515.)

"The question whether the existing or anticipated conditions and surroundings justified a change in restrictions concerning the storage of oil and gasoline in the vicinity of the plaintiff's plant was a matter for the determination of the city council, and no bad faith or its equivalent was established." (L. C. 516.)

"It cannot be said that the evidence conclusively established the infallibility of the device used as a preventative of explosions, or its superiority in that regard to the placing of the tanks underground." (L. C. 517.)

"If the safety of the public, in the honest judgment of the city council, reasonably exercised, requires the burying of tanks, these considerations of expense and convenience to the oil company can interpose no obstacle." (L. C. 519.)

Counsel endeavors to distinguish the case of The Cities Service Oil Company v. The City of Marysville (supra) in which the ordinance involved in this cause was upheld, reasoning that that decision applied only to the facts of that case. The Court's attention is invited to Defendants' Exhibits C, D, and E, and the map marked "Defendants' Exhibit J" and "Plaintiffs' Exhibit A," and Findings LI and LXI (a), (b), (c), (d), (m), and (o). In the pictures, the Court will observe the tanks of The Cities Service Oil Company, they being those marked "Crew Levick." An examination of the maps and of the Master's Findings, will show that really the only difference between the two sets of facts is that the Sinclair tanks are located on Lot Number Nine (9), in Block Seventy-one (71), whereas the tanks of The Cities Service Oil Company are located on Lot Number Eleven

(11) or Twelve (12), of the same South half of Block Seventy-one (71). The Cities Service tanks are just 110 feet from the Sinclair tanks, and as shown in Finding LXI (b), are approximately the same distance from the Long, Stone, McLucas Lumber Company's coal shed, that is 75 feet. Generally speaking the surrounding property, subject to damage, is the same, and the nature of the commodity and the business sought to be regulated, of course, is the same.

V. The dissenting opinion of Judge Phillips.

We respectfully suggest the following error in the dissenting opinion of Judge Phillips:

That opinion relies on a few general findings in the nature of conclusions and totally ignores the findings with reference to the relative hazard in the light of the facts and circumstances at Marysville, which are inconsistent with and do not support the conclusions made by the Master.

That opinion concludes that the testimony of witnesses of expert knowledge based on practical experience in the storing and handling of gasoline clearly establishes that the ordinance in question will not promote the public safety, as pointed out elsewhere in this brief. None of the Petitioners' witnesses knew anything about underground storage; the only evidence of leaks were from underground storage in brick and masonry repectacles and storage of a kind and character and in places not comparable in any manner whatsoever with those in

Marysville, Kansas. *Who testified from knowledge gained from practical experience in storing large quantities of gasoline underground* and under the particular circumstances in the City of Marysville, Kansas, if Fenwick, Respondents' witness, did not? What bit of evidence shows that large business interests consider underground storage as practical if the evidence of Bowman with reference to underground storage by the great Union Pacific Railway system does not? And why do the great fire insurance companies of America place a fifty (50) per cent lower rate on underground storage, and why do these companies and their affiliated associations, recommend underground storage positively as the safer, if they do not have practical experience upon which to base it?

And what consideration has the dissenting Judge given to the undisputed evidence and the findings that those things which produce the danger from leaks in underground storage, electrolysis and floating out of tanks, are absolutely eliminated and corrosion and vibration made negligible; or to the undisputed evidence and findings that even if leaks occur there are no sewers or wells into which seepage could occur; or to the fact that the findings and the testimony, including that of the Petitioners' witnesses, show that there is greater hazard above ground from lightning, which causes a large percentage of the fires in petroleum storage from static electricity and from the danger from explosions and from fire communicated to the storage from the burning of other combustible property. The dissenting opinion

gives no consideration to any of these items so pertinent in this case.

Specifications of Error No. 2.

"The Circuit Court of Appeals erred in repudiating and nullifying the report and Findings of the Special Master (which were approved by the Trial Court) made on conflicting evidence and which by the Circuit Court of Appeals must be deemed to be presumptively correct'."

Under this Specification we shall discuss only that subdivision which appears at pages 29 to 39 of the Petitioners' brief, headed as follows:

> "THE CONCLUSIONS, FINDINGS AND RECOMMENDATIONS OF THE MASTER, WHICH WERE APPROVED AND CONFIRMED BY THE TRIAL COURT, ARE PRESUMED TO BE CORRECT, AND THERE IS NOTHING IN THIS CASE TO REBUT THAT PRESUMPTION OR TO JUSTIFY THE ACTION OF THE CIRCUIT COURT OF APPEALS IN REJECTING AND NULLIFYING THE MASTER'S FINDINGS."

We are quite in accord with the citations and authority contained in the Petitioners' brief (31-4) as to the weight to be given to Findings of a Special Masters concurred in by the Court.

In considering this question it is well to bear in mind these fundamental principles established by this Court in Kimberly v. Arms, 129 U. S. 512, 32 L. Ed. 764, being one of the cases cited by the Petitioners:

> 1. The findings of a master in chancery, upon a matter referred to him in a cause, are advisory to the

court, which it may accept or disregard, according to its own judgment as to the weight of the evidence.

2. It is not within the general province of a master to pass upon all the issues in an equity case, and the court cannot refer to him the entire decision of a case without the consent of the parties.

3. But when the parties consent to a reference of a case to a master to hear and decide all the issues therein, and such reference is entered as a rule of the court, his findings cannot be disregarded at the mere discretion of the court, but are to be taken as presumptively correct—subject, however, to be reviewed under the reservation contained in the order of the court for manifest error.

The order of reference (R. 19) was not one by consent and merely directed the Master to make Findings of Fact and Conclusions of Law, and make his report thereon recommending the judgments to be entered.

Petitioners' authorities are to the effect that the Findings and Conclusions of the Special Master will not be disturbed unless a serious or important mistake of fact has been made, or a controlling error of law committed. It is our contention that serious and important mistakes have been made and controlling errors of law committed by the Special Master and the Trial Court.

Petitioners contend that the Circuit Court has misconceived the Master's duties and has substituted its judgment for that of the Master in stating that,

> "Furthermore, in his resume, he had found that the greater number of the dangers incidental to the storage of gasoline and kerosene are removed by placing large containers underground,"

and points out that such a statement is contradictory to Master's Findings XXVIII and XLV.

After all, there is not much difference in opinion as to the facts which have been proved in this cause. The great preponderance of real Findings of Fact are conclusive on both of the parties. These are the findings of actual facts relied on by the respondents. Such findings as XXVIII, XLV, and LXI relied upon by the Petitioners are nothing more than conclusions of the Master deduced from controversial opinion which respondents contend, and the Circuit Court upheld, are not sustained by the findings of actual facts made by the Master.

How could the Master reconcile the finding that the tanks were safe from the standpoint of public safety and at the same time make findings LXXXI, LXXXIV, LXXXV, LXXXVI, and LXI and LXII? (See Respondant's brief, pages 29 and 32.)

How could the Master reconcile Finding XXIX to the effect that the tanks were located in a sparsely populated part of the city with findings LXI and LXII, showing that this is not a fact? (See Respondents brief, pages 30 and 31.)

How could the Master reconcile the findings XXX and LXIII to the effect that there were no changed conditions with findings Nos. LXIX, LXX, and LXXI? (Respondants' brief, pages 31 and 32.) Attention is called to the fact that the Master found that more residences would be built in the vicinity of Block 71 on account of the very changed conditions, which he found.

How could the Master reconcile the findings that crude

oil is a greater hazard than gasoline and at the same time find that neither of the Petitioners now nor never did, nor did any one else ever store crude oil in the City of Marysville, and other findings of a similar inconsistent nature? (Respondents' brief, page 33-4.)

How could the Master reconcile the findings Nos. XXXII and XXXIII to the effect that the nearest dwelling house to the Standard tanks is more than 98 feet, and at the same time make finding LXII showing that there is a large amount of combustible property closer to these tanks than that? (Respondents' brief, page 34.)

Further surprising mistakes on the matters of fact are been pointed out elsewhere herein.

Controlling errors also have been committed in the application of the law.

The Petitioners were permitted to urge contentions for classes not represented and not complaining, and to that extent the Court was dealing with an imaginary case, which more fully appears at page 21 of this brief. In the light of these manifest mistakes and errors this Court will not rest its judicial power on the findings of the Master, and will not "fetter its discretion or judgment by any artificial rules as to the weight of the Master's findings", as it so well said in Mayor and Alderman of the City of Knoxville, Appt., v. Knoxville Water Company, 212 U. S. 53 L. Ed., 371:

> "The purpose of this suit is to arrest the operation of a law on the ground that it is void and of no effect. It happens that in this particular case it is not an act of the legislature that is attacked, but an ordinance of a municipality. Nevertheless the function of

rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. Prentis v. Southern R. Co., 211 U. S. 210, 282, ante, 67, 29 Sup. Ct. Rep. 67; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, ante, 55, 29 Sup. Ct. Rep. 55. There can be at this day no doubt, on the one hand, that the courts, on constitutional grounds, may exercise the power of refusing to enforce legislation, nor, on the other hand, that that power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact, the invalidating facts must be proved to the satisfaction of the court. *In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though they be confirmed by the trial court. The power is best safeguarded against abuse by preserving to this court complete freedom in dealing with the facts of each case.* Nothing less than this is demanded by the respect due from the judicial to the legislative authority. It must not be understood that the findings of a master, confirmed by the trial court, are without weight, or that they will not, as a practical question, sometimes be regarded as conclusive. *All that is intended to be said is, that in cases of this character this court will not fetters its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation.* We approach the discussion of the facts in this spirit."

In this connection the Petitioners lay great stress on Manorville Borough, Appt., v. Flenner, 286 Pa. 103-107

(Petitioners Brief 34). This case is clearly distinguishable on two grounds. In the first place it involves an ordinance *prohibiting* and not regulating the storage of gasoline. In the second place the Findings of the Trial Judge that the manner of storage was not dangerous, *not having been excepted to*, were binding on the Supreme Court of Pennsylvania. There was nothing else before the Court and it could not do otherwise than to hold the ordinance to be unreasonable. The Court being bound by the findings to the effect that the storage of gasoline was not a nuisance held that the ordinance which attempted to make it so by legislative fiat and therefore prohibiting it, was unreasonable.

Specification of Error No. 3.

"The Circuit Court of Appeals erred in denying Appellees Petition for Rehearing."

Under this specification the Petitioners complain of error in the admission of evidence to prove fires and explosions at bulk storage stations at Hays, McCracken, Robinson, Greenleaf, and Fort Scott, and in Kansas, contending that said evidence was incompetent, and that for that reason Finding No. LXXXI was not founded on competent evidence.

This question arose before the Master and the Trial Court, and thereafter was urged strongly upon the Circuit Court of Appeals upon Petition for Rehearing.

1. This evidence was competent and relevant under the issues framed by the Pleadings.

The Standard Oil Company alleged in Paragraphs X and XIX of its Amended Bill of Complaint (R. 4 and 7):

> X. "That the storage and keeping of said products in such tanks so equipped and maintained and operated, adjacent to railroads and railroad switches within cities and towns, including the city of Marysville, Kansas, is now and for more than ten years last past has been a safe, useful convenient and necessary incident and practice of plaintiff's said business, and has been during said period and now is required by modern methods of commerce, transportation and habits of life and has been established, maintained and universally recognized throughout the state of Kansas and the United States as a necessary and legitimate means of conducting said business and same in no way infringes upon, injures or adversely affects the health, morals, safety or welfare of individuals or the public."
>
> XIX. "That it is more dangerous from the standpoint of the health of the public to establish, maintain and operate oil tanks of the kind and for the purposes aforesaid (fol. 8) under the ground than above ground in the manner that plaintiff is now maintaining and operating same as aforesaid in the said city of Marysville and elsewhere."

Identical language is found in the Amended Bill of Complaint of the Sinclair Company in Paragraph X and XVIII. (R. 12 and 16.)

The allegations quoted were generally and specifically denied by respondents and thus became an issue in the action.

Upon trial before the Master Petitioners (plaintiffs be-

low) offered testimony that the Standard Oil Company had 12,201 tanks similar to the Marysville tanks and had fires or explosions at 66 of them (R. 196 and 354), all over the objections and exception of the respondents.

Petitioners' also offered testimony of a concrete fuel oil tank leaking (Tasker, R. 282); of a tank which leaked at De Kalb, Illinois, (Griffin, R. 166-8), of leaking tanks at Frankfort and Galesburg, Illinois, (Gamber, R. 174) and numerous other instances found in record, against objection of respondents. This testimony was produced presumably for the purpose of demonstrating by a showing of what had and had not occurred at other places, that the ordinance was unreasonable. Respondents then offered testimony of what had occurred at other storage stations, by way of fires and explosions, with the resulting loss to life and property, to show the reasonableness of the ordinances and its justification as an exercise of the Police Power.

Petitioners have tendered the issue in their Amended Bill of Complaint, and having offered evidence to support the allegations, the evidence of fires and explosions at other similar tanks was competent to rebut and negative the testimony of Petitioners offered in support of the allegations quoted.

Petitioners contend that they had a right to show that tanks '*similar*' to the ones at Marysville were not likely to catch fire, or explode, but that the City, in support of the reasonableness of a police regulation could not show that such tanks frequently did catch fire and explode, and the disastrous consequences attending when they did. Pe-

titioners' trouble lies partly in the loose use of the word '*similar*', both by themselves, and by the Master. Tanks which were *similar* when they did not explode or catch fire, suddenly become *dissimilar* when anything happens. It is also interesting to note that the Sinclair Company objects to testimony of fire at Standard tanks, and the Standard Oil Company objects to testimony of fires at Sinclair tanks.

If the rules of evidence were as Petitioners claim them to be, "the reasonableness or unreasonableness of the ordinance could only be determined by evidence relevant to the property of said oil companies keeping and storing gasoline within the City of Marysville," (Petitioners' Brief, P. 21), strictly applied to the entire record, Petitioners would be without testimony. Almost without exception, every witness of Petitioners was an expert who gave his opinion based upon facts and conditions at places other than at Marysville, and not shown to have been the same as at Marysville, and the only competent evidence in the record on the subject would be that of Fenwick who has four tanks stored in the same city block where Sinclair property is located. (R. 219-227; 268-270.)

Petitioners cite two cases in support of their contention which we do not doubt correctly states the law as applied to the facts in those cases. The first case is Natural Illuminating Gas Co. v. New Hampshire Fire Insurance Company, 53 N. E. 485. We suggest that that case is of an entirely different character than the case at bar. It is an action in damages for negligence, as to which the

negligence of the defendant company must be claimed to have been the proximate cause of the damage. It was shown that the various consumers through the size of mixers and keys in their possession, controlled the volume of gas, which factor was a very material item in the proof of this case.

Whatever the rule may be in negligence cases, we submit that it has no application to an equity case wherein the reasonableness of an exercise of the police power is in question. The nature of the product, its tendencies, and potentialities, and its killing range could only be proven by showing what had taken place at other places having the same type of equipment and commodity.

The plaintiffs' contend that no proof would be competent unless it shows that some tank somewhere and at some time, of the exact size, dimensions, and capacity, with exactly and same devices, and operated in exactly the same manner, exploded, or that fire from such a tank damaged person or property. To contend this is to lose sight of the fundamentals of proof and the fundamental fact that rules determining relevancy are founded upon practical experience rather than strict logical theory because absolute certainty is not attainable except in a few cases where the fact at hand is apparent to one's own senses. And so we have bottomed our rules of relevancy on the facts from which the existence of a few in use may properly be inferred. And any facts which tend to show or make it reasonable to infer that the public safety would be endangered by explosion or fire under the circumstances at Marysville are facts rele-

vant to the issue. That such testimony was competent and relevant will appear more fully in the discussion of the appropriate findings of the Master at pages 26-52 of this brief.

To follow the Petitioners' theory, a fire or an explosion at a tank which had one less "do-dad" than their tanks, or possibly a goose-neck turned the other direction than theirs, or the tanks in pumping arrangement spaced a little differently at the bulk storage yard would all be reasons why evidence would be admissible because the circumstances were not "similar." The rules of relevancy are not bottomed on any such fine spun and impractical theories.

And if the Standard Oil Company insists for its purposes that the word "similar" means "identical" what will the Sinclair Refining Company do.

The Court's attention is specifically invited to the fact that the only device which the Standard tank at Marysville did not have, it is claimed, is a safety manhole cover. This is supposed to make a great deal of difference. But mark you the Sinclair Refining Company does not use this cover at all. It has no patent safety valve arrangement on the manhole, but just an ordinary lid, with a little play in it. (See Plaintiff's exhibits C. and R.) Even the Standard tanks are not immune from fire with this patent manhole cover, or of damaging other property by fire, as is shown by the testimony of Mr. Brooks. (R. 384-8.) But even if they were, what about the Sinclair tanks which do not have the patent cover. They seemed to burn at McCracken. (R. 241-6.) In this

connection we urge the Court to read the testimony as to the various fires set out as follows: (Robinson, R. 228-32; Greenleaf, R. 238-40, 384-7; McCracken, R. 24-6; Fort Scott, R. 251-3; Hays, R. 255, 266-7, 271-7.)

Considering the nature of the commodity, the surrounding facts and circumstances, the issues, and the nature of this cause, the Master did not err in admitting this testimony and the same was competent to support Finding No. LXXXI.

In order that the situation with reference to Finding No. LXXXI (R. 62) may be clearly understood, and no misapprehension gained from Petitioners' statement that counsel for respondents consented to striking out certain parts of this finding, we should like to call attention to the record relating to it.

In the first instance the Master found in second Paragraph of Finding No. LXXXI the following:

> "The record shows fires at five storage stations in Kansas; two in 1919, two in 1922, and one in December, 1923. The McCracken and Greenleaf fires were at tanks of the Sinclair Company, equipped with McDonald Duplex Vents and loose manhole covers, the same or similar to those of the Company at Marysville, and at McCracken the top of the vertical gasoline tank was blown out and the kerosene tank exploded and was lifted off the foundation and thrown to the ground fifteen feet therefrom."

Petitioners excepted to all of said finding and upon hearing of the exceptions before the Trial Court, this paragraph was stricken out entirely because unsupported by the testimony. The only thing wrong was that it recites that the McCracken and Greenleaf fires were

both at tanks of the Sinclair Company, whereas, the testimony shows (Armstrong R. 288; Quinley R. 237; Brooks R. 384) that the Greenleaf fire was at Standard tanks, equipped identically as those at Marysville, and the McCracken fire was at Sinclair tanks equipped similarly, if not identically, to the ones at Marysville.

With reference to the McCracken fire the testimony of Frankenstein describes the equipment, the manholes and the McDonald Vents and states that they are standard equipment used in by the Sinclair Company (R. 1-4); that the roof of the K. T. gasoline tank blew off and the K. T. gasoline tank was lifted off its foundation into the road. (R. 242.) And Keuffer testified that the manhole covers on the Sinclair tanks blew off and as to the K. T. tanks substantiated the testimony of Frankenstein (R. 246), and that the K. T. tanks had 16-inch manhole covers. (R. 247.) That the fire at Greenleaf was at the Standard Oil Company's tanks and that the same were equipped with the McDonald Safety Vent and the Standard Oil Company's patented manhole safety vent cover is shown by testimony of Quinley, R. 240 and Brooks, R. 385-7.

Instead of correcting the finding to conform to the testimony, the Trial Court struck it out entirely. And counsel for respondents certainly did not consent or agree to this action, but merely approved the journal entry (R. 87-88) relating thereto as to form, notwithstanding the fact that the Trial Court in his decree thereafter recites that we did. (R. 89.)

The Good Faith of the City Council.

Petitioners make particular reference to the testimony of Mayor Travelute to the effect that the ordinance was not passed because of what had happened (Petitioners' Brief, pp. 42, 50). Of course, what the Mayor had reference to was that there had not been any fire or damage in Marysville. However, as this goes to the faith of the City Council, as do also the statements that said council waited so long after the Hays explosion, we suggest that the stipulation, however, entered into and set out in Petitioners' brief at page 47, shows that efforts had been made for two years prior to that time to have ordinances which regulate in a manner agreeable to the oil company, but said efforts were ineffectual. However, this ordinance was passed on October 8, 1923, and the attention of the Court is invited to the fact that the Greenleaf fire occurred just thirty days before that time, to-wit, on September 6, 1923. And if it be thought that bad faith inheres in this action, I think the Court below has disposed of the same in the decree wherein he stated the following:

> "Preliminarily it may be said of this case, what gives rise to the controversy here presented, had its origin in a fire which occurred at the tanks of the Standard Oil Company at the City of Hays, this state, in November, 1919, in which an oil tank exploded causing a severe conflagration and loss of life, etc."

The Unnecessary Length of the Record.

The attention of this Court is invited to the unnecessary length of the transcript of record. When this case was appealed by these Respondents to the Circuit Court of Appeals, what in Counsel's judgment was a proper narrative of the evidence covering the Assignments of Error was prepared and submitted. The Petitioners not being satisfied submitted a complete abstract of all of the testimony and the Court approved it over the objection of these Respondents. It will be observed that of the eighty-seven (87) Findings of Fact, no exceptions were taken by either party to Findings I to VIII, XI and XII, XIV and XV, XVII-XIX, XXXIII and XXXIV, XLVIII-LII, LIV and LV, LVII-LVIX, LXI and LXII, LXIV, LXIX-LXXXVI, yet all of the evidence pertaining to each and all of these undisputed findings which go to make up fully two-thirds of the record on this appeal, were at the request of the Petitioners, and by order of the Trial Court made a part of the transcript of the record.

CONCLUSION.

For the reasons stated herein, we respectfully urge that the Circuit Court of Appeals, Eighth Circuit, did not err in reversing the decree of the U. S. District Court for the District of Kansas, and directing that the Bills of Complaint be dismissed, and that the decision should be affirmed.

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